Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

IVAN EBERHART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

What limits does the Confrontation Clause place on the prosecution's ability to introduce highly incriminating testimonial statements of non-testifying witnesses for the non-hearsay purpose of establishing the background and course of the police investigation?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings below other than those identified in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ivan Eberhart respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1-17) is reported at 467 F.3d 659. An earlier opinion of the Seventh Circuit in this case (App. 18-26) is reported at 434 F.3d 935. The Seventh Circuit's first opinion in this case (App. 41-55) is reported at 388 F.3d 1043. The district court's opinion (App. 35-40) granting a new trial is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2006. A timely petition for rehearing and rehearing *en banc* was denied on December 15, 2006. App. 56. On March 5, 2007, Justice Stevens extended the time for filing a petition for a writ of certiorari to May 14, 2007. App. 57. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

STATEMENT

After petitioner was convicted of one count of drug conspiracy, the trial court granted him a new trial on the

ground, among others, that the government – despite petitioner's rights under the Confrontation Clause – had unnecessarily introduced testimonial assertions of a non-testifying informant that incriminated petitioner. The Seventh Circuit reversed, holding – contrary to the law of several other circuits and many state courts – that the government was entitled to introduce these out-of-court testimonial assertions in order to explain the "course of the investigation." This case presents the Court with an opportunity to create order in this area of law and clarify the circumstances under which the government may rely on the "background" or "course of the investigation" justification to admit deeply incriminating hearsay evidence that is not subject to cross-examination.

1. On December 16, 1998, Federal Drug Enforcement Agency ("DEA") agents arrested Charles Bolden after inducing him to sell two kilograms of cocaine to an informant. Tr. 39-52. Following his arrest, Bolden cooperated with the DEA and named the petitioner Ivan Eberhart as his drug supplier. Tr. 53.

At the behest of the DEA, Bolden made several phone calls to Eberhart and arranged for a taped meeting with Eberhart, in which Bolden sought to elicit incriminating statements and to arrange a drug deal. Bolden was never able to effect any such deal with Eberhart, or to elicit any unambiguously incriminating remarks. During the course of these conversations, Bolden and Eberhart discussed a debt that Bolden owed Eberhart, but the conversation never relates this debt to any drug deals. Nonetheless, the agents arrested Eberhart. No drugs or other indicia of drug dealing were seized from Eberhart.

During the three days following his arrest, Eberhart was interrogated extensively by the DEA. Eventually,

Eberhart sought to cooperate by identifying a drug dealer, whom he claimed was his supplier. According to the DEA agents, Eberhart made a series of incriminating statements during this period (although, as will be discussed below (*infra*, 27-28), virtually none of them were ever corroborated in any meaningful way).

2. Eberhart was charged in a two-count federal indictment. Count One alleged that Eberhart conspired to sell "kilogram quantities of cocaine to Charles Bolden so Bolden could resell the cocaine to others." Count Two alleged that Eberhart delivered to Bolden the two kilograms of cocaine which were the subject of Bolden's arrest.

At trial, DEA Agent Robert Glynn testified that Eberhart had admitted during the interrogations to having sold kilogram quantities of cocaine to Bolden and others. The agent also testified that Eberhart identified his supplier as "Tommy." Tr. 199-204.[1] The agent explained that, at the DEA's behest, Eberhart tried to make a deal with his supplier, but Eberhart was never able to arrange any sort of drug deal and the agents were never able to identify anyone named "Tommy." Eberhart identified a local drug house where he claimed "Tommy" lived. When DEA agents searched that home they found a money counter, scales and a weapon, but found no drugs and

[1] Eberhart's statements were not memorialized in any way by the agents. Tr. 207, 270, 281, 490. Neither agent could produce any notes from the interrogations (Tr. 274, 490) and their report describing Eberhart's statements was not filed until nearly three months after his arrest. Tr. 283. At sentencing, the district court expressly found that the defendant's "confession" was not reliable because it was given while he was under pressure "to enhance his supposed value as a witness to the agents." Sentencing Tr. at 36.

could never tie the location to anyone named "Tommy." Tr. 217-218.

The government also played recordings of the calls between Bolden and Eberhart, arguing to the jury that some of Eberhart's statements to Bolden supported an inference that the two of them were involved in drug dealing. Gov. Exh. 6-8; Tr. 527-536. On their face, these statements were not inherently incriminating. For example, Bolden said, "Uh, I need about two more," and Eberhart responded, "Okay." Gov. Exh. 6A. Toward the end of the taped recording of Bolden's meeting with Eberhart, there is talk about Bolden owing Eberhart money, but there is no reference to the nature of that debt. Gov. Exh. 8A.

The government decided not to call Bolden to the stand. (It later explained that it declined to call Bolden because of "irreconcilable conflicts in his proffers," in that he had given at least six conflicting accounts of where, when and how he received cocaine from Eberhart. R. 131, 132. See Supp. Record 12/4/02 Tr. p. 7). Nonetheless, the jury heard about Bolden's out-of-court statements incriminating Eberhart through two DEA agents who testified about Bolden's statements to them.

Over defense objection, Agent Daniel Foley testified that after the DEA arrested Bolden in a sting operation, Bolden immediately agreed to cooperate with the DEA. Agent Foley testified before the jury that Bolden told him that his supplier was "E," and that "E" was the source of the cocaine that the DEA had just seized. Tr. 54. Foley further testified that Bolden provided the agents with a pager number for his supplier which Bolden then used to contact Eberhart. Tr. 57.

Agent Robert Glynn also testified about Bolden's out-of-court statements implicating Eberhart, telling the jury

that Bolden agreed to cooperate against his "cocaine source of supply, who[m] he identified to us as 'E.'" Tr. 189. Agent Glynn testified before the jury that Bolden told the DEA agents that Bolden owed "E" $40,000 in connection with a "previous cocaine transaction." Tr. 190. Agent Glynn then identified Eberhart as the person Bolden referred to as "E." Tr. 195-196.

The defense objected to the admission of this evidence, but the district court held that it was admissible under the "course of the investigation" doctrine. The court instructed the jury not to consider Bolden's statements for the truth of their contents. Tr. 54.

In the defense case, Eberhart presented five alibi witnesses (including two law enforcement officers) who testified that at the time the government claimed Eberhart was delivering the two kilograms of cocaine to Bolden, Eberhart was at his home which had been burglarized that day. Tr. 370-419, 510-518. The defense also presented testimony that Eberhart and Bolden had a legitimate business relationship connected to a music store. At the time of their arrests, Bolden owed Eberhart and his mother money for the sale of that store (meaning that the talk in the tapes about money Bolden owed to Eberhart was not evidence of any sort of drug debt). Tr. 430-32.

Following seventeen hours of deliberations, the jury returned a verdict of guilty on the conspiracy charge. At the same time, the jury found Eberhart not guilty on the substantive count charging the two kilogram delivery. R. 111.

3. The district court granted Eberhart's motion for a new trial based on the cumulative effect of three trial errors, one of which was the government's introduction of Bolden's out-of-court accusatory statements. R. 139. The district court explained:

> At trial, I permitted the agents to state that Charles Bolden told them that his source of supply was an individual nicknamed "E." The agents then had Bolden set up a meeting with "E" who turned out to be Eberhart. I admitted this evidence, not for its truth, but to explain why the officers did what they did. Were I to rule on this issue again, I might rule differently because there was no hint in the opening statement that Eberhart planned to defend on the ground of improper law enforcement. * * * The agents were entitled to explain why they did what they did, but they did not need to say that Bolden said, in essence, that "E" is my supplier.

App. 35-36.

On the government's interlocutory appeal, the Seventh Circuit reversed, holding that the district court lacked jurisdiction to consider two of the three errors upon which it had relied (including the Confrontation Clause claim), and that the third error was not cause for a new trial. App. 41-55. This Court granted certiorari and reversed the Seventh Circuit. The Court held that the district court had jurisdiction to consider all three claims of error. *Eberhart v. United States*, 126 S. Ct. 403, 407 (2005).

On remand (still proceeding on the governments' appeal), the Seventh Circuit again reversed the grant of a new trial, this time on the ground that none of the three claims of error cited by the district court "either alone or in combination, provided a sufficient basis for the district court to grant a new trial." App. 19. Of relevance to this Petition, the Seventh Circuit held that the evidence of Bolden's statements to the agents was admissible as an "explanation of why the investigation proceeded as it did" because it "gave context to the recorded phone conversation that the jury heard." App. 25. The Seventh Circuit

stated that the trial court's limiting instruction "addressed any potential hearsay harm from the testimony." App. 24. The court also noted that the evidence was cumulative and that the government "did not dwell" on Bolden's statement. App. 25.

Eberhart filed a protective petition for certiorari, even though he had yet to pursue his own appeal from the final judgment and it was not clear that this Court had jurisdiction over a defendant's interlocutory appeal in that posture. This Court denied certiorari. *Eberhart v. United States*, 127 S. Ct. 228 (2006).

During the pendency of the proceedings growing out of the government's appeal, the district court entered judgment against Eberhart and sentenced him to 135 months of custody. In determining the quantity of drugs involved for purposes of sentencing, the trial court explicitly held that it did not find Eberhart's confession (which included a claim that he sold very large quantities of cocaine) to be reliable even under the preponderance of the evidence standard. Sentencing Tr. 36. The trial court also reiterated its view that "Eberhart didn't get a fair trial." *Id.* at 39.

Now that there was a final judgment in his case, Eberhart was able to pursue his appeal. The Seventh Circuit heard that appeal and affirmed his conviction. App. 1-18. With regard to the Confrontation Clause, the Seventh Circuit stood by its earlier decision rejecting those claims. App. 17 n.1.

REASONS FOR GRANTING THE WRIT

As the Seventh Circuit's decision in this case demonstrates, there is a much-used device through which juries are exposed to evidence severely damaging to defendants – even though the defendants have no opportunity to confront the

evidence. Through the "background" or "course of the investigation" rationale, law enforcement agents are being allowed to testify about highly incriminating information they learned from non-testifying witnesses under the theory that the jury will not consider the information "for the truth of the matter asserted."

This supposition that jurors can segregate information in this manner (particularly when it involves direct accusations by co-defendants or alleged co-conspirators) is the very fiction that this Court rejected in *Bruton v. United States*, 391 U.S. 123 (1968). There are, to be sure, circumstances in which compelling justifications necessitate reliance on limiting instructions, despite the risk that jurors will find it impossible to heed the instructions to limit their consideration of the evidence to some narrow issue. See *Tennessee v. Street*, 471 U.S. 409 (1985). The Seventh Circuit never came close, however, to assessing whether this was one of those circumstances. Instead, it casually accepted the government's "course of investigation" claim without ever subjecting that justification to the probing inquiry that *Street* and the decisions of many federal and state courts demand.

The Seventh Circuit is not alone in its failure to impose any meaningful burden on the government's introduction of evidence under the "course of investigation" rationale. See *infra*, 16-17. By contrast, many other courts have recognized the need for a probing inquiry into whether the evidence that the government seeks to introduce in this way is sufficiently critical so as to justify the risks associated with its admission (even when accompanied by limiting instructions). See *infra*, 11-14, 18-21. See generally 2 Kenneth Brown, et al., *McCormick on Evidence* § 249 at 136 (1987) ("One area where abuse may be a particular problem involves statements by arresting or investigating

officers regarding the reason for their presence at the scene of a crime. * * * The need for this evidence is slight, and the likelihood of abuse is great."). This issue would benefit greatly from this Court's guidance, and, as will be seen, this case presents an excellent vehicle for articulating the governing legal principles.

I. COURTS ARE DIVIDED ON WHETHER THE PROSECUTION MAY ROUTINELY PRESENT TESTIMONIAL STATEMENTS OF NON-TESTIFYING DECLARANTS IN ORDER TO DESCRIBE THE "BACKGROUND" OR "COURSE OF THE INVESTIGATION."

It has long been established that the Confrontation Clause distinguishes between out-of-court testimonial statements admitted for the truth of the matter asserted and out-of-court testimonial statements admitted for some other relevant non-hearsay purpose (such as to show how a person reacted upon hearing the out-of-court statement). See *Tennessee v. Street*, 471 U.S. 409, 413-414 (1985). In the first category, because the contents of the out-of-court statement is being used as substantive evidence against the defendant, the Confrontation Clause affords the defendant a right to cross-examine the declarant in order to probe the truth of the statement. In the second category, because the evidence is not admitted to prove the out-of-court declarant's statement was true, the defendant has no right to cross-examine the out-of-court declarant about the truth of what was said. Rather, the Confrontation Clause is satisfied so long as the defendant may cross-examine the witness who claims that the words were uttered. This Court recently reaffirmed this distinction in *Crawford v. Washington*, 541 U.S. 36, 59 (2004) ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

The difficulty in applying these rules – a difficulty that long predates *Crawford* and persists after *Crawford* – is how to treat evidence that is being admitted for a limited purpose not involving the truth of the matter asserted, but nonetheless presents a powerful risk that the jury will, in fact, consider it as substantive evidence against the defendant. This issue arises frequently with respect to police testimony that a non-testifying informant told them incriminating information about the defendant which then led them to commence an investigation into the defendant's conduct (often referred to as "background" or "course of the investigation" evidence).

Some federal and state courts routinely have allowed such evidence, under the theory that it is admissible to show how the police reacted when they heard the informant's words – not for the truth of what the informant said. These courts have trusted that limiting instructions to the jury can ensure that jurors will not allow the substance of the incriminating evidence they have heard to affect their deliberations on the defendant's guilt or innocence. This approach finds support in the general "assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

Other courts have been far more wary. These courts have held that given the grave risks that the "background" or "course of investigation" evidence will be considered by the jury for its substance – *i.e.*, for the truth of the matter asserted – such evidence may only be admitted when it is critical to a fact properly at issue in the case. Even then, these courts have taken care to ensure that the jury is shielded from gratuitous details about the contents of the out-of-court statement. This approach is premised on the proposition that "there are some contexts in which the risk

that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135-136.

This case squarely presents the question whether (as many courts have held) courts may rely on limiting instructions alone in this context, or whether (as many other courts have held) limiting instructions are only acceptable where two other conditions are satisfied: (a) there is a *bona fide* need for admitting the evidence; and (b) all steps have been taken to reduce the jury's exposure to the statement's contents.

A. Courts are divided on whether "background" or "course of the investigation" evidence may be routinely admitted, even when it does not address an issue vital to the prosecution's case.

Many courts apply a probing inquiry to determine whether the prosecution's legitimate need to introduce "background" or "course of the investigation" in the particular case justifies the risk that the evidence will be used against the defendant substantively – despite the absence of confrontation.[2] The Third Circuit, for example, has

[2] In some instances courts conduct this inquiry directly under the Confrontation Clause and in other cases the courts look to the Rules of Evidence, applying Federal Rule of Evidence 403, or its state-law equivalent, to determine whether the value of admitting the evidence outweighs the potential prejudice of admission. No matter which of these routes courts take, they deal with the same goal of avoiding violations of the defendant's rights under the Confrontation Clause. In this case, the Seventh Circuit addressed only the Confrontation Clause issue, making this case a good vehicle for the Court to address the constitutional issue – which applies to federal and state courts alike.

recognized that, although relating the full narrative of the history of the investigation may make the prosecution's story flow more easily, it is generally not very relevant to the issue being tried. See *United States v. Reyes*, 18 F.3d 65, 71 (3d Cir. 1994). Numerous other Circuits engage in an equally rigorous inquiry, determining whether the evidence about the background of the investigation is only marginally relevant to a general narrative or whether it really serves an important function in the context of the case. See, *e.g.*, *Ryan v. Miller*, 303 F.3d 231, 253 (2nd Cir. 2002) (asking how important the information is to the jury's understanding of the relevant issues); *United States v. Martin*, 897 F.2d 1368, 1372 (6th Cir. 1990) (citing *Bruton* for the proposition that limiting instructions are inadequate when there is no issue in the case about allegations of improper investigative methods).

In *United States v. Evans*, 216 F.3d 80 (D.C. Cir. 2000), the government decided not to call an informant who had told the FBI that Evans was selling drugs (similar to what happened in the case at bar). Instead, the government had the FBI agent testify that he had learned information that Evans was involved in drug trafficking. The court recognized the great danger of this testimony:

> The problem with hearsay is that it deprives the defendant of the opportunity to cross-examine the person who uttered the statement at issue. Here, the government presented allegations of prior drug dealing, and the defendant was unable to cross-examine the person who made them. At the time of the testimony, that person – the less-than-reputable convict, Thomas Rose – was sitting in a federal correctional institution. Meanwhile in court, telling Rose's story, was the clean-cut FBI agent, Neil Darnell. Thus, Evans had no opportunity to "test[] the recollection and

> sift[] the conscience" of his accuser, nor could he compel him "to stand face to face with the jury in order that they [might] look at him, and judge by his demeanor upon the stand and the manner in which he [gave] his testimony whether he [was] worthy of belief." *California v. Green,* 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (quoting *Mattox v. United States,* 156 U.S. 237, 242-43, 15 S.Ct. 337, 39 L.Ed. 409 (1895)). Cross-examination may be the "greatest legal engine ever invented for the discovery of truth," *Green*, 399 U.S. at 158, 90 S.Ct. 1930, but it is not of much use if there is no one to whom it can be applied.

Evans, 216 F.3d at 85.

In light of these concerns, the court in *Evans* asked hard questions about the government's assertion that the testimony was admissible as "background." The court concluded that "if 'background' was related to a fact 'of consequence to the determination' of this case, it was only barely so." *Id.* at 87. Given the "insignificant probative value of the testimony as background," as compared to the dangers that the jury would use the information as evidence of guilt, the court held the evidence inadmissible – recognizing both evidentiary law and potential Confrontation Clause implications. *Id.* at 87, 89.

The Kentucky Supreme Court has captured this inquiry in articulating its two-part standard: "A police officer may testify about information furnished to him by an absent witness only if that information tends to explain the action that was taken by the police officer as a result of that information *and* the taking of that action is an issue in the case." *Young v. Commonwealth*, 50 S.W.3d 148, 167 (Ky. 2001) (emphasis in original). The Louisiana Supreme Court has similarly recognized the grave *Bruton* problems associated with admitting out-of-court statements to describe the

course of the investigation. *State v. Broadway*, 753 So. 2d 801 (La. 1999):

> The fact that an officer acted on information received in an out-of-court assertion may be relevant to explain his conduct, but this fact should not become a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule. * * * Marginally relevant nonhearsay evidence should not be used as a vehicle to permit the introduction of highly relevant and highly prejudicial hearsay evidence which consists of the substance of an out-of-court assertion that was not made under oath and is not subject to cross-examination at trial. * * * There was no true issue in the present case as to the propriety of any action taken by [the Agent] during his investigation.

Id. at 808.

These courts have recognized that "in practically every case, the motive, intent, or state of mind of such an officer will not be 'matters concerning which the truth must be found.'" *Brown v. State*, 549 S.E.2d 107, 111 (Ga. 2001). This follows from the fact that "a criminal prosecution is designed to find the truth of what a defendant did, and, on occasion, of why he did it. It is most unusual that a prosecution will properly concern itself with *why* an investigating officer did something." *Ibid.* For this reason, the "repetition of the rote words 'to explain conduct' can become imprimatur for the admission of rumor, gossip, and speculation." *Ibid.* (quoting *Teague v. State*, 314 S.E.2d 910, 911 (Ga. 1984)).

At times, this inquiry will lead to a conclusion that the evidence is vital to the prosecution's case. "The government need not sit idly by while being maligned." *United States v. Forrester*, 60 F.3d 52, 60 (2nd Cir. 1995). For example, in *Commonwealth v. Chmiel*, 889 A.2d 501 (Pa. 2005), the Pennsylvania Supreme Court held that "not every out-of-court statement having bearing upon subsequent police conduct should be admitted." *Id.* at 433. Hence, the court examined the prosecution's "need for the statements." *Ibid.* In that case, because the defendant "had attacked the adequacy of the investigation," the court held that he had "opened the door" for the prosecution to present testimony about the course of the investigation. *Ibid.* See also *Reyes,* 18 F.3d at 71 (evidence becomes more relevant where "defendant has engaged in tactics that would justify rebuttal").

In contrast to the approach these courts have taken, many other courts have not engaged in any inquiry about the importance of the evidence to the issue at controversy in the case. The Seventh Circuit's decision in this case is emblematic of this approach. All that the court asked was whether the evidence about Bolden's statement was relevant to explaining the "course of the investigation." It never asked why evidence about the course of investigation was important (or even relevant) to any of the issues the jury had to decide regarding the charges against Eberhart.[3]

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[3] The extent to which the Seventh Circuit conducted no inquiry beyond the bare relevance question is further illuminated by the way in which the court distinguished *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004). In *Silva*, the court had reversed a conviction based on the erroneous admission of hearsay statements to show "course of the investigation." In the case at bar, the Seventh Circuit limited *Silva* to

(Continued on following page)

Many other courts have taken a similar approach to the question – simply declaring that any evidence that is relevant to explaining the background of the investigation is *per se* admissible, regardless of the extent to which it implicates the defendant and the concomitant risk that limiting instructions will be ineffective. See, *e.g.*, *United States v. Brown*, 923 F.2d 109, 111 (8th Cir. 1991) (allowing detective to testify about an anonymous informant's tip because it was "offered for the limited purpose of explaining why a police investigation was undertaken"); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (allowing agent to testify about hearsay he learned from another agent because it explained "why a government investigation was conducted"); *Hobgood v. State*, 926 So. 2d 847, 852 (Miss. 2006) (allowing officer to testify that a non-testifying declarant told him defendant abused a child because it showed why the officer's report identified defendant as a suspect); *Commonwealth v. Gaynor*, 820 N.E.2d 233, 254 (Mass. 2005) (allowing officer to testify that a witness told him the victim drove off with the defendant because it showed the "state of police knowledge" which "drew their attention to the defendant"); *State v. Crow*, 871 A.2d 930, 936 (R.I. 2005) (allowing officer to testify about an informant's report because it demonstrated how the officer became involved in the investigation); *Dednam v. State*, 200 S.W.3d 875, 881 (Ark. 2005) (relying on *Street* for the

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narrow grounds, explaining that *Silva* only condemned the admission of background evidence because the evidence in *Silva* had no relevance to anything – even to explaining the course of the investigation. By contrast, having found that the evidence in Eberhart's case was relevant to describing the "course of the investigation," the Seventh Circuit never inquired why that issue mattered to the case or how important it was to the prosecution's case.

proposition that there is no problem allowing evidence that demonstrated the reasons that a search warrant was obtained); *State v. Deck*, 136 S.W.3d 481, 485 (Mo. 2004) (allowing officer to testify that someone told him a robbery and possible murder was going to happen because it explained "subsequent police conduct" and supplied "relevant background information and continuity"); *Vanvorst v. State*, 1 P.3d 1223, 1234 (Wyo. 2000) (allowing officer to testify about information provided by dispatcher because it was "background information indicating that a police officer did not act without reason"); *Dinkins v. State*, 894 S.W.2d 330, 347 (Texas Ct. Crim. App. 1995) (allowing officer to introduce substance of an appointment book because it showed "how the defendant came to be a suspect"); *State v. Thomas*, 400 N.E.2d 401, 408 (Ohio 1980) (allowing officer to testify that unknown informants told him that bookmaking was happening at a certain address because it "was offered to explain the subsequent investigative activities").

This case provides the Court with an opportunity to establish a standard of inquiry into the need for admitting out-of-court testimonial statements under the "background" or "course of the investigation" theory. As one district court noted, "Over the years, I have carefully reviewed the rules of evidence in an attempt to find the 'background' exception to the hearsay rule. Thus far, I haven't been able to locate the rule; but it is firmly established in courthouse lore." *United States v. Levine*, 378 F. Supp.2d 872, 875 (E.D. Ark. 2005). There is wild inconsistency among courts addressing this issue. Only guidance from this Court will create a uniform approach that protects defendants' Confrontation Clause rights while also ensuring that the prosecution is allowed to introduce

evidence that is truly necessary to the facts at issue in the case.

B. Courts are divided on whether the prosecution must introduce admissible "background" or "course of investigation" evidence in a manner that best protects the defendant's Confrontation Clause rights.

Even in cases in which evidence of out-of-court statements is critical to some significant issue in the case, many courts have insisted that the evidence be presented in a manner that minimizes the impairment of a defendant's rights under the Confrontation Clause. Thus, many courts have insisted that the government witness use a formulation such as "upon information received" to lay out the course of the investigation, as opposed to actually restating the content of the information (particularly when the contents directly incriminate the defendant). This requirement accommodates the government's legitimate interests while still seeking to be as protective as possible of the defendant's rights under the Confrontation Clause.

For example, the Third Circuit has explained that even when evidence about a report made to the police is admissible to show how the investigation proceeded, officers may not relate the "contents of that report if the same contextual explanation could be adequately conveyed by the statement that officer was responding to 'information received.'" *United States v. Price*, 458 F.3d 202, 208 (3d Cir. 2006). See also *United States v. Maher*, 454 F.3d 13, 23 (1st Cir. 2006) (Information about the police investigation was "surely relevant but that is not our question." Rather the question is whether the police could have simply spoken about "information received" instead of

divulging the contents of informant's tip.) As a leading treatise explains, "a statement that an officer acted 'upon information received,' or words to that effect, should be sufficient to inform the jury about why the officers acted as they did." *McCormick on Evidence, supra* at 136-137.

Many state courts have also endorsed and applied this requirement. See, *e.g.*, *State v. Colon*, 864 A.2d 666, 726-727 (Conn. 2004) (justifying admission of evidence on the ground that the officer did not testify "as to anything the victim's sister had actually said to him"); *State v. Vandeweaghe*, 827 A.2d 1028, 1035 (N.J. 2003) (" 'when an officer becomes more specific by repeating what some other person told him concerning a crime by the accused,' that testimony violates * * * the accused's Sixth Amendment right of confrontation" (internal citations omitted)); *State v. Litzau*, 650 N.W.2d 177, 183 (Minn. 2002) (given Confrontation Clause concerns, "[c]ontext and background can be established, and are properly established, without the admission of the confidential informant's hearsay declaration"); *Commonwealth v. Yates*, 613 A.2d 542, 543 (Pa. 1992) ("the prosecution could easily have explained the course of police conduct without introducing the informant's incriminating statements [by testifying] that they acted 'upon information received' or words to that effect"); *State v. Braxter*, 568 A.2d 311, 315 (R.I. 1990) (to avoid Confrontation Clause concerns "it is necessary to limit police testimony to the fact that they 'received information' that led them to be where they were at a particular time").

Courts have been particularly careful about enforcing this requirement when the content of the out-of-court testimonial statement goes to the core issue of the case (as Bolden's statements did here). See *United States v. Becker*, 230 F.3d 1224, 1229 (10th Cir. 2000) (problem of introducing

substance of out-of-court statement was "exacerbated because the evidence the government presented to 'explain the course of its investigation' * * * goe[s] to precisely the issue the government was required to prove" (quoting *United States v. Cass*, 127 F.3d 1218, 1223 (10th Cir. 1997)), *People v. Johnson*, 506 N.E.2d 563, 568 (Ill. 1987) (the detectives "did more than simply recount what they had done; their testimony regarding the statements * * * directly implicated the defendant"); *Yates*, 613 A.2d at 543 (statements were problematic because they were "of a highly incriminating sort" and contained "specific assertions of criminal conduct"); *Litzau*, 650 N.W.2d at 183 (error was exacerbated because informant's statements "pointed directly to the defendant's guilt of the crime for which he was on trial").

Courts also have engaged in an especially careful inquiry when the risk of prejudice is particularly high, such as the statements in *Bruton* (and the statements in this case) because the hearsay evidence is an admission of a co-defendant or alleged co-conspirator.[4] See *United States v. Alonzo*, 991 F.2d 1422 (8th Cir. 1993) (recognizing that limiting instructions are particularly unhelpful when the out-of-court statement is that of an alleged co-conspirator); *Reyes*, 18 F.3d at 71 (prejudice was great when the "co-conspirator's statements addressed the most important disputed issue at trial"). See generally *Bruton*, 391 U.S. at 135-139 (describing the particular risks

[4] There is no dispute in the case at bar that the evidence was not admissible under any co-conspirator exception. Bolden made these statement after he began cooperating with law enforcement. See *Krulewich v. United States*, 336 U.S. 440 (1949); Fed. Rule Evid. 801(d)(2)(e).

associated with letting juries hear about statements of other defendants that shift blame or otherwise implicate the defendant).

By contrast, other courts have not applied these inquiries or minimization requirements at all, holding that so long as the prosecution introduces evidence under the "background" or "course of investigation" theory, and so long as there are limiting instructions, there are no Confrontation Clause issues at stake. The Seventh Circuit's decision in this case is an example of this approach. Any inquiry into minimizing the Confrontation Clause prejudice to Eberhart, or considering the particular vice of admitting the confession of another defendant, is totally missing from the Seventh Circuit's analysis. Instead, the court simply referred to the "course of investigation" theory espoused by the prosecution and never addressed whether the prosecution's interests could have been satisfied by a simple reference to the fact that the agents received "information" that led them to investigate Eberhart.

The Seventh Circuit in this case is not alone in failing to impose this requirement on the prosecution. Each of the cases cited above (*supra*, 16-17) in which courts have unquestioningly accepted the government's "course of investigation" label fall into this category. They are each an instance in which a court has not demanded that the government justify its need for disclosing content beyond the fact that the officer received "information" that led to the next step of the investigation.

Granting certiorari in this case will provide the Court with an opportunity to decide whether telling the story about the background of an investigation provides carte

blanche for prosecutors to introduce the content of inflammatory evidence. During an era in which the Court has recognized the vital importance of the Confrontation Clause (see *Crawford*, 541 U.S. 36), it is fitting for the Court to regulate the wide backdoor through which evidence not subject to confrontation frequently is being admitted.

II. THIS COURT SHOULD REJECT THE VIEW THAT LIMITING INSTRUCTIONS ARE SUFFICIENT TO PROTECT DEFENDANTS' RIGHTS UNDER THE CONFRONTATION CLAUSE AND THAT NO FURTHER SAFEGUARDS ARE NEEDED.

In *Bruton v. United States*, 391 U.S. 123 (1968), this Court recognized an important reality about the Confrontation Clause and jurors' capacity to ignore highly incriminating evidence. In that case, two defendants – Evans and Bruton – were tried jointly, and the prosecution introduced Evans's admission against Evans alone. The jury was carefully instructed not to consider that evidence against Bruton in any way – because doing so would violate Bruton's rights under the Confrontation Clause. This Court reversed Bruton's conviction, holding that

> because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

Bruton, 391 U.S. at 126.

In reaching this decision, the Court recognized that, despite the admonition to the jury to cabin its use of the

evidence to a particular admissible purpose, the effect of the evidence "cannot be wiped from the brains of jurors" when considering the case as a whole. *Id.* at 129. Therefore, the Court explained, "the government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Ibid.* (quoting *Delli Paoli v. United States*, 352 U.S. 232, 248 (1957) (Jackson, J., dissenting)).

This realization is consistent with the writing of some of the Nation's greatest jurists, upon whom the Court in *Bruton* relied. Justice Cardozo for example, writing about limiting a jury's consideration of evidence to a single purpose, warned that this exercise requires "discrimination so subtle [that it] is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown out all weaker sounds." *United States v. Shepard*, 290 U.S. 96, 104 (1933). Chief Justice Roger Traynor similarly cautioned that "a jury cannot segregate evidence into separate intellectual boxes." *People v. Aranda*, 407 P.2d 265, 271-272 (Cal. 1965). In sum, as Justice Jackson put it, "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

Given the extreme prejudice Bruton would suffer by the jury's improper consideration of his co-defendant's confession, the Court in *Bruton* held that the risk of the jury impermissibly considering that evidence against Bruton was intolerable. See also *Jackson v. Denno*, 378 U.S. 368, 388-389 (1964) (recognizing the intolerable risk that, even if properly instructed, the jury would consider a

defendant's confession despite the jury's finding it to be involuntary). At the same time, *Bruton* recognized that there may be other contexts in which reliance on limiting instructions is tolerable. See *Bruton*, 391 U.S. at 1627 ("Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions."). The difficulty has been in determining where that dividing line rests.

The Court took up that question in *Tennessee v. Street*, 471 U.S. 409 (1985). In *Street*, the defendant sought to challenge the reliability of his own confession by arguing that the police had told him the facts of another suspect's (Peele's) confession and the police had coerced him by demanding that Street parrot the facts of Peele's confession. To rebut this claim, the trial judge allowed the prosecution to introduce testimony about Peele's confession, for the limited purpose of disproving Street's claim that his confession was identical to Peele's. This use, of course, was not for the truth of matters asserted in Peele's confession, so there was no Confrontation Clause problem with admitting Peele's confession for that limited purpose. See *id.* at 413-414. There was a risk, though, that the jury would rely on Peele's confession not only for that limited purpose, but in considering Street's guilt as well.

In addressing that concern, the Court balanced the risk against the alternative of excluding the evidence. First, the Court addressed the "critical" nature of the evidence to the issues properly before the jury. *Street*, 471 U.S. at 413. Were the prosecution not allowed to introduce evidence about Peele's confession, the Court explained, the jury would have been "impeded in its task of evaluating the truth of [Street's] testimony and handicapped in weighing the reliability of his confession." *Id.* at 415.

Second, the Court stressed that there were "no alternatives" such as severance or redaction "that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence." *Id.* at 415.

In *Bruton*, there were alternatives available that would avoid prejudice to the defendant's rights under the Confrontation Clause. The trials of the co-defendants could have been severed or the co-defendant's statement might have been redacted. See *Richardson*, 481 U.S. at 209 ("*Bruton* can be complied with by redaction"). Hence, there was no justification for exposing Bruton to the possibility that the jury would consider the co-defendant's statement against Bruton himself. In *Street*, by contrast, the Court explained that there was no way other than introducing the detailed contents of the co-defendant's statement to allow the government to rebut the defendant's contentions about the contents of that statement. Hence, the evidence was admissible.[5]

The two-part inquiry in *Street* provides the proper approach for determining whether evidence may be admitted for some limited purpose despite the risk that the defendant's Confrontation Clause rights will be violated by the jury's considering it for broader impermissible purposes. First, a court must address whether the purpose for which the evidence is being introduced is truly an

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[5] The Court's discussion in *Richardson* of examples where evidence is admitted subject to a limiting instruction all deal with evidence that is critical to the prosecution's case. See *Richardson*, 481 U.S. at 206-207 (citing examples such as impeaching a defendant's testimony). None of them deal with evidence that is introduced for only marginally relevant purposes. *Richardson*, of course, also dealt with a case in which the statement had been redacted to minimize the gravity of the risk.

essential one for the prosecution – so essential that it justifies incurring risks of improper usage. Second, a court must look at whether other alternatives exist that will accomplish the prosecution's legitimate goals while eliminating or minimizing the Confrontation Clause problem. The Seventh Circuit asked neither of these critical questions here (and many other courts similarly fail to conduct this inquiry). Granting certiorari on this issue will allow the Court to announce standards that will generate consistent treatment of this often-recurring issue. As we will now explain, this case presents a particularly good vehicle to accomplish this goal.

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE THROUGH WHICH THE COURT CAN ADDRESS THE ISSUE.

Granting certiorari to review the Seventh Circuit's decision in this case presents an excellent vehicle for addressing how courts are to evaluate the "background" or "course of the investigation" justification for admitting out-of-court testimonial statements. This case fits the classic pattern in which the issue arises and about which lower courts have taken such different approaches. This is not a case in which the answer is obvious because the trial judge failed to give a limiting instruction or the prosecution violated a limiting instruction by using the testimony as substantive evidence in its closing argument. Nor is this a case in which the defendant asserted some defense that opened the door for the prosecution to present evidence about the course of the investigation. See App. 35 (district court found that Eberhart never hinted at any defense that made the evidence in question particularly relevant). Rather, this case presents the issue in precisely

the posture that will allow the Court to consider the recurring issues presented.

Should the Court grant certiorari and hold that evidence about Bolden's testimonial statements (or at least their content) should never have been admitted, that error will not be dismissible as harmless. Bolden was the alleged co-conspirator in the count for which Eberhart was convicted and his testimonial statements directly implicated Eberhart in the conspiracy. The prejudice of admitting his out-of-court statements is manifest.

The prosecution relied on two sources of evidence in this case: (1) Eberhart's uncorroborated (indeed refuted) confession to the agents and (2) tapes of Eberhart's conversations with Bolden. The prosecution never called Bolden as a witness and no other witness ever testified to any sale. The government's efforts to induce Eberhart to sell drugs to Bolden utterly failed. Nor did the authorities ever find any drugs on Eberhart's person or in his home.

With regard to the confession, the reliability of Eberhart's uncorroborated statement during the DEA interrogations was the central issue in the case. The defense contended that the confession was entitled to no weight, given the pressure that Eberhart was under to admit to drug-dealing in order to cut a deal for himself by implicating someone higher up in the chain (which he never was able to do). Moreover, the agents conceded that they had no notes of the meeting with Eberhart and did not file their report of the meeting until three months later. Tr. 283. To cast further doubt on the confession, the defense showed that a central part of Eberhart's confession – his claim that he delivered two kilograms of cocaine to Bolden on December 15 – was demonstrably false. Five witnesses, including two law enforcement officers, testified that

Eberhart was with them that day and could not have made the sale. Tr. 370-419, 511-518.

It is no surprise, then, that the jury acquitted Eberhart on the count alleging he made that sale – even though he had confessed to it. Obviously, the jury doubted the value of the confession. Indeed, the trial court explained that the confession was not reliable evidence because it was given in the course of Eberhart's attempt to cooperate and while he was under pressure "to enhance his supposed value as a witness to the agents." Sentencing Tr. 36. In a case in which the defense challenges the reliability of a confession, it is not possible to declare an error harmless on the ground that evidence of that confession was introduced in the case.

The prosecution's second category of evidence was the tapes. On their face, these tapes were quite innocuous – there is no mention of drugs whatsoever. To the extent that the jury convicted on the basis of the tapes (which appears quite likely given its rejection of a central part of the confession), it was the evidence about Bolden's out-of-court testimonial statements that allowed the jury to find significance in the tapes. Having heard that Bolden told the agents that "E" was his supplier[6] and that he owed Eberhart $40,000 for a drug debt, the jury was able to conclude that the tapes were strong evidence of a drug conspiracy. It was Bolden's statements that made comments such as "I need about two more," and discussion of a debt suspicious. The role that these statements played in

[6] The use of the word "E" instead of Eberhart has no impact here. See *Gray v. Maryland*, 523 U.S. 185 (1998) (Confrontation Clause problems are not cured by the use of a shorthand or pseudonym when it is clear that the statement refers to the defendant). In any event, Agent Glynn explicitly told the jury that "E" was Eberhart. Tr. 190, 196.

rendering the tapes highly incriminating highlights the immense prejudice that Eberhart suffered when he was denied his right to confront the evidence of Bolden's statements.

Were more evidence needed to show that the error cannot be dismissed as harmless, one need look no further than the Seventh Circuit's opinion. In the course of rejecting Eberhart's sufficiency-of-the-evidence claim, the court observed that "Eberhart's taped conversations suggested that he provided Bolden with $40,000 worth of drugs on credit." App. 16. The tapes never mention any $40,000 figure, though. The only mention of $40,000 was from Agent Glynn's testimony about Bolden's out-of-court statement that he owed Eberhart $40,000 for a drug debt. If the Seventh Circuit was unable to segregate the information that came from Bolden's statements (which were not admitted for their truth), how can one assume that the jury deliberated without being influenced by the highly incriminating evidence which Eberhart never had an opportunity to confront?

In sum, there are strong reasons to believe that Eberhart might not have been convicted had the jury not been exposed to the co-conspirator's out-of-court claims that Eberhart was his supplier and that he owed him $40,000 for drugs. The government declined to call Bolden as a witness precisely because he was untrustworthy and "there were irreconcilable conflicts in his proffers." Supp. Record of Dec. 4, 2002 at p. 7. See also R. 132, Ex. A, B, C, D and F (showing that Bolden had given at least six conflicting statements). Yet, through the "course of the investigation" portal the jury heard Bolden's statements incriminating Eberhart without ever hearing all the powerful impeachment that would have been forthcoming

had Bolden been subject to cross-examination.[7] Should the Court grant certiorari and determine that the content of Bolden's statement never should have been admitted, Eberhart will surely be entitled to the new trial which the trial judge ordered.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 14, 2007

[7] Indeed, given that Bolden's incriminating statements were not admitted as substantive evidence, the defense was not even entitled to an instruction telling the jury that because Bolden made his statements in an effort to secure benefits from the government, "his testimony must be considered with great caution and care." Seventh Circuit Pattern Jury Instruction 3.13.

467 F.3d 659

United States Court of Appeals, Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Ivan EBERHART, Defendant-Appellant.
No. 05-2366.

Argued Sept. 6, 2006.
Decided Nov. 1, 2006.
Rehearing and Rehearing En Banc Denied Dec. 15, 2006.

Amarjeet Singh Bhachu (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Leonard C. Goodman (argued), Chicago, IL, for Defendant-Appellant.

Before FLAUM, Chief Judge, and BAUER, and POSNER, Circuit Judges.

FLAUM, Chief Judge.

On April 3, 2002, a jury convicted Ivan Eberhart of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846 and acquitted him of distributing cocaine in violation of 21 U.S.C. § 841(a)(1). Eberhart appeals his conviction, arguing that his trial was tainted by prosecutorial misconduct, improperly admitted evidence, and improper jury instructions. He also claims that the district court erroneously denied his motion for acquittal. For the following reasons, we affirm Eberhart's conviction and sentence.

I. Background

On December 16, 1998, DEA Agents Daniel Foley and Robert Glynn arrested Charles Bolden after he sold two

kilograms of cocaine to a government informant. Once arrested, Bolden agreed to help apprehend his supply source, who he identified as "E" and who the agents later identified as Eberhart.

At the agents' direction, Bolden made several calls to Eberhart to arrange for the purchase of two additional kilograms of cocaine. While Bolden made the calls, Agent Foley listened to Bolden's half of the conversations, and the agents made tape-recordings of both sides of the conversations. During one of the calls, Bolden said he needed "two more," and Eberhart said "okay." They also agreed to meet the next day outside a Kentucky Fried Chicken near the intersection of 83rd Street and Martin Luther King Drive in Chicago.

Before the meeting, the agents instructed Bolden to discuss a previous cocaine transaction, to indicate a willingness to pay Eberhart for a previous cocaine-related debt, and to give them a signal once the conversation occurred so that they could arrest Eberhart. Agent Glynn placed a transmitting device and tape recorder underneath Bolden's clothing to allow the agents to listen to the conversation as it occurred and preserve the conversation for later use.

When Eberhart arrived at the previously agreed-upon location, he expressed (a well-founded) concern that Bolden was wearing a wire:

> EBERHART: I'm talking about what you was talking about when you was down there at the office down at DEA. Uh.
>
> . . . .

> BOLDEN: All mother fuckers shady, you think I'm wired or something.
>
> EBERHART: I'm just wondering, I'm just wondering. . . . You'd be concerned too (Unintelligible) I'm just curious.

Govt. Transcript 8A. Once Bolden allayed Eberhart's fears that he was acting as a government informant, the men discussed a $40,000 debt that Bolden owed Eberhart. Eberhart expressed his general lack of concern about the debt, and the meeting ended. Bolden exited the car and signaled the agents, who arrested Eberhart. They discovered no drugs in Eberhart's possession.

The agents read Eberhart his *Miranda* rights, and he confessed that he had distributed between twenty and forty kilograms of cocaine per month, that Bolden was one of his customers, and that he had sold Bolden two kilograms of cocaine on December 15, 1998. Eberhart also agreed to help the agents arrest his supply source, identified only as "Tommy." Eberhart gave the agents a physical description of Tommy, his cellular and pager phone numbers, and the location of a "stash house" out of which Tommy operated. Eberhart explained that he received his drugs from Tommy on consignment and that he would pick up his cocaine at the stash house at 6:00 a.m. or 6:00 p.m.

At the agents' direction, Eberhart then called Tommy to arrange a purchase. Soon after Eberhart made that phone call, however, he ceased cooperating, and the agents never located Tommy. Nevertheless, they followed up on the information that Eberhart had provided, and a consensual search of the stash house uncovered two high-speed money counters, a firearm, and a scale.

At trial, the government introduced evidence of the investigation as described above. They played recordings of Eberhart and Bolden's conversations on the phone and in the car and provided the jury with transcripts of these conversations prepared by Agent Foley. The defense offered evidence that on December 15, 1998, the date that Eberhart allegedly sold two kilograms of cocaine to Bolden, Eberhart was at home – from 2:00 p.m. until midnight – dealing with the aftermath of a residential burglary at his home. Several witnesses testified that Eberhart was at his residence during this time fixing a broken window, speaking with police, and installing burglar bars. This testimony was problematic for the prosecution, because Bolden claimed that Eberhart had sold him drugs on the afternoon of December 15, 1998.

At trial, Eberhart made evidentiary objections and requested a number of jury instructions. He made a general objection, which the court overruled, that the government transcripts of the tape recordings were inaccurate. He also objected to the agents' testimony concerning the recorded conversations between Bolden and Eberhart, claiming they were hearsay. The court overruled the objection, concluding that the government was offering the statements, not for the truth of the matter asserted, but to explain the course of their investigation.

Eberhart also requested a missing witness instruction, which would have allowed the jury to draw a negative inference based on the government's decision not to call Bolden. The government objected, arguing that Bolden had pleaded guilty without a plea agreement and that the witness was not particularly within its power to produce. The court refused to give the instruction. Eberhart also sought a *Sears* instruction, which would have informed the

jury that it could not consider Bolden a co-conspirator based on actions he took after December 16, 1998, the day he began cooperating with the government. The court refused this request as well, stating, "I'm satisfied [if] the government makes it clear in its argument that it does not regard Bolden as a conspirator after the time of the arrest." R. 478. The prosecutor responded, "Yes, correct." *Id.* Defense counsel then stated, "If they make that plain to the jury, I think that goes a long way." *Id.* During closing argument, the government did not tell the jury that it should not consider Bolden a conspirator after the time of his arrest.

On April 3, 2002, the jury convicted Eberhart of conspiring to distribute or possess more than five kilograms of cocaine but acquitted him of distributing cocaine. On May 15, 2002, Eberhart filed a motion for a new trial, arguing, among other things, that one of the transcripts of the tape recordings, Transcript 7A, wrongly indicated that Eberhart requested to meet Bolden "face to face." In a supplemental brief filed on October 30, 2002, Eberhart also argued that the district court erred by allowing Agent Foley to testify about his conversations with Bolden and by not instructing the jury that a buyer-seller relationship cannot form the basis of a conspiracy conviction.

In a post-trial hearing on his motion for a new trial, Eberhart offered evidence that Bolden was willing to cooperate with the government at the time of Eberhart's trial. Bolden's attorney, Jonathon Minkus, testified that Bolden's sentencing was delayed for over a year and a half "in part" because of his desire to earn a lower sentence in exchange for cooperation. Minkus claimed that the government was reluctant to use Bolden, however, because of repeated and irreconcilable conflicts in his proffers.

Eberhart also offered expert testimony that he never requested to meet Bolden "face to face" as indicated in Transcript 7A.

On March 21, 2003, the district court denied Eberhart's motion for judgment of acquittal but granted his motion for a new trial. It reasoned that "the possibility that [Transcript 7A] is not supported by the tape, the absence of a buyer-seller instruction[,] and . . . the testimony that Bolden gave the name 'E' as his supplier all together persuade me that the interests of justice require a new trial." *United States v. Eberhart,* No. 98 CR 946, 2003 WL 1340047, at *3 (N.D.Ill. March 19, 2003). The court stated that "none of these concerns standing alone or in pairing would cause me to grant a new trial[, but] the combination of all three causes me to grant the motion." *Id.*

On appeal, we reversed the district court's decision, concluding that the district court did not err by admitting Transcript 7A and that we had no jurisdiction to consider arguments that Eberhart had raised for the first time in an untimely filed supplemental memorandum. *United States v. Eberhart,* 388 F.3d 1043, 1049-50 (7th Cir.2004) (*Eberhart I*). The Supreme Court reversed our decision, holding that Federal Rule of Criminal Procedure 33(a) is not a jurisdictional limitation. *Eberhart v. United States,* 546 U.S. 12, 126 S.Ct. 403, 407, 163 L.Ed.2d 14 (2005). On remand, we considered the arguments in Eberhart's supplemental memorandum but found, once again, that the district court erred by granting a new trial. *United States v. Eberhart,* 434 F.3d 935, 940 (7th Cir.2006) (*Eberhart II), cert. denied,* ___ U.S. ___, 127 S.Ct. 228, ___ L.Ed.2d ___ (2006).

The district court then sentenced Eberhart to 135 months in prison. At the sentencing hearing, the defense argued that the jury's conclusion that the conspiracy involved more than five kilograms of cocaine was contrary to the weight of the evidence and should be set aside. The district court rejected the argument.

II. Discussion

In this appeal, Eberhart makes three new arguments. He contends that the district court erred by refusing a missing witness instruction and a *Sears* instruction; the government did not properly authenticate its tape recordings before offering them into evidence; and the government did not offer sufficient evidence to support a conviction.

A. Missing Witness Instruction

Eberhart first argues that the government violated his due process rights by misrepresenting to the district court that Bolden was not cooperating with the government. Had the government been more forthright, Eberhart contends, he would have been entitled to a missing witness instruction, which would have allowed the jury to conclude that Bolden's testimony would have been unfavorable to the prosecution. *See Graves v. United States,* 150 U.S. 118, 120-21, 14 S.Ct. 40, 37 L.Ed. 1021 (1893).

This argument fails for two reasons. First, Eberhart has not pointed out any misrepresentation made by the government. We noted as much in our first two rulings. *Eberhart II,* 434 F.3d at 939-40; *Eberhart I,* 388 F.3d at 1051. He maintains that the government dishonestly

stated that Bolden was not cooperating, but in the portion of the trial transcript he cites, the government only asserts that Bolden received no benefit for his cooperation and that Bolden "turned the other way at some time." R. 471-72. The record demonstrates that both of these statements were true. Bolden never entered a cooperation agreement with the government, and for a period of time in 1999, he stopped cooperating altogether (though after he was convicted at trial, he began making proffers again).

Second, even if the government had advised the district court that Bolden was willing to testify for the government, Eberhart would not have been entitled to a missing witness instruction. To obtain that instruction, a defendant must prove that "the absent witness was peculiarly within the government's power to produce" and that "the testimony would have elucidated issues in the case and would not merely have been cumulative." *See United States v. Brock,* 417 F.3d 692, 699 (7th Cir.2005). Eberhart has not established, or even argued, that the government was in a better position than he was to produce Bolden at trial. Indeed, at oral argument Eberhart's attorney acknowledged that he could have called Bolden but chose not to do so. Under these circumstances, the district court did not err by refusing to give a missing witness instruction. *See United States v. Rollins,* 862 F.2d 1282, 1298 (7th Cir.1988) (holding that the district court did not err in concluding that an incarcerated government informant was not particularly within the government's power to produce); *United States v. Torres,* 845 F.2d 1165, 1169-70 (2d Cir.1988).

Eberhart also argues, citing *United States v. Kojayan,* 8 F.3d 1315 (9th Cir.1993), that by not disclosing Bolden's willingness to cooperate, the government violated his

rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Kojayan,* the government accused Kojayan of conspiracy to possess heroin with intent to distribute. An undercover police officer testified on behalf of the government and recited statements made by one of Kojayan's alleged co-conspirators named Nourian. Before trial, Kojayan had attempted to discover Nourian's whereabouts and whether he had agreed to cooperate with the government, but the government refused to provide Kojayan with this information. It did provide her with the name of Nourian's attorney, but the attorney only said that if called, Nourian would invoke his Fifth Amendment privilege against self-incrimination. During closing argument, Kojayan's attorneys asked the jury to infer that Nourian's testimony would have undercut the government's case. In response, the government falsely claimed that it was not capable of calling Nourian. In truth, the government had a cooperation agreement with Nourian but decided against calling him. The court held that the government violated *Brady* by not disclosing the cooperation agreement, which might have convinced the district court to give the jury a missing witness instruction. *Kojayan,* 8 F.3d at 1322.

In this case, unlike *Kojayan,* the government did not make any misrepresentations to the jury or to the district court and did not refuse to disclose the existence of a cooperation agreement (indeed, none existed). In addition, as discussed above, even if the government had disclosed Bolden's willingness to cooperate, Eberhart would not have been entitled to a missing witness instruction because he could have called Bolden himself. For these reasons, *Kojayan* is distinguishable; no *Brady* violation occurred here.

B. *Sears* Instruction

Eberhart next argues that the district court erred by refusing a *Sears* instruction, which states that an agreement with a government informant cannot constitute a criminal conspiracy. *See Sears v. United States,* 343 F.2d 139 (5th Cir.1965). The court reviews a district court's refusal to give a theory of defense instruction *de novo. United States v. Buchmeier,* 255 F.3d 415, 426 (7th Cir.2001).

> [A] defendant is entitled to a jury instruction as to his or her particular theory of defense provided: (1) the instruction represents an accurate statement of the law; (2) the instruction reflects a theory that is supported by the evidence; (3) the instruction reflects a theory which is not already part of the charge; and (4) the failure to include the instruction would deny the appellant a fair trial.'

Id. (quoting *United States v. Swanquist,* 161 F.3d 1064, 1075 (7th Cir.1998)).

The government argues that Eberhart was not entitled to a *Sears* instruction because it was inconsistent with his defense at trial. A jury instruction, however, does not have to completely track the defense presented; it need only represent "a theory that is supported by the evidence." *Buchmeier,* 255 F.3d at 426. Because the jury could have inferred a continuing conspiracy between Bolden and Eberhart based on the December 16 and 17, 1998 conversations, a *Sears* instruction was proper. *See United States v. Duff,* 76 F.3d 122, 127 (7th Cir.1996) (holding that a *Sears* instruction was proper where the indictment was worded in a manner that allowed the jury to believe that the conspiracy with the confidential informant was enough to convict the defendant and the confidential informant's

drug transactions with the defendant played a prominent role in the trial).

The error was harmless, however, because based on the special verdict, the jury must have concluded that Eberhart conspired to distribute cocaine before December 16, 1998. The transaction that Bolden and Eberhart contemplated on December 16 and 17 only involved two kilograms of cocaine, but the special verdict stated that Eberhart conspired to distribute five or more kilograms of cocaine. Consequently, the jury necessarily found that Eberhart conspired to distribute drugs sometime before December 16, and the district court's decision not to provide a *Sears* instruction was not prejudicial.

It is possible, of course, that the decision not to give a *Sears* instruction affected the jury's drug quantity determination. For instance, the jury may have concluded that Eberhart conspired to distribute three kilograms of cocaine before December 16 and two kilograms afterwards. That possible error has no bearing, however, on the validity of the conspiracy conviction, which is the only concern we have here. Ultimately, the drug quantity determination was one for the district court to make at sentencing, and, as discussed below, it did not err in concluding that the conspiracy involved more than five kilograms of cocaine.

C. Authentication of Tapes

Eberhart next argues that the district court erred by admitting Government Exhibits 6, 7, 8, and 10, a number of tape recorded conversations between Eberhart and Bolden and between Eberhart and Tommy. Eberhart contends that the government did not properly authenticate the tapes and that the tapes contain inadmissible

hearsay. Eberhart concedes that he made no objection to Exhibits 7 and 10 and that, as a result, we should review their admission for plain error. He does maintain, however, that he properly objected to the improper authentication of Exhibits 6 and 8. The government disagrees.

At trial, Eberhart explained his objection to Exhibit 6, a tape recording of four December 16, 1998 phone calls between Bolden and Eberhart, as follows, "The objection to the tape is based on the fact that there was no adequate foundation in terms of showing that the tape-recording equipment had been tested and functioning properly." R. 63. With regard to Exhibit 8, a recording of Eberhart and Bolden's conversation outside Kentucky Fried Chicken, Eberhart made a general foundation objection. Neither of these objections sufficiently advised the district court and the government that Eberhart was contesting the authentication of the tapes. A "foundation" objection is "simply a loose term for preliminary questions designed to establish that evidence is admissible" and is not usually specific enough to preserve an alleged error on appeal. *See A.I. Credit Corp. v. Legion Ins. Co.,* 265 F.3d 630, 637-38 (7th Cir.2001); *United States v. Barker,* 27 F.3d 1287, 1292 (7th Cir.1994). Moreover, an objection concerning whether the recording equipment was functioning properly would not have alerted the district court to Eberhart's current objection that the tapes were not true and accurate recordings of the December 16 and 17, 1998 conversations between Bolden and Eberhart. *See United States v. Westmoreland,* 312 F.3d 302, 311 (7th Cir.2002). Consequently, we review the admission of Government Exhibits 6, 7, 8, and 10 for plain error, which requires Eberhart to demonstrate an error that was obvious, affected his substantial rights, and seriously affected the fairness, integrity, or

public reputation of the judicial proceedings. *United States v. Montgomery,* 390 F.3d 1013, 1017 (7th Cir.2004).

Before a tape recording may be properly admitted at trial, Federal Rule of Evidence 901(a) requires the government to offer "evidence sufficient to support a finding that the [tape] in question is what its proponent claims." We have said that this requires the government to show by clear and convincing evidence that the proffered tape is a true, accurate, and authentic recording of the conversation between the parties. *Westmoreland,* 312 F.3d at 311. It may do so by establishing the chain of custody or by offering testimony of an eyewitness that the recording accurately reflects the conversation he or she witnessed. *See United States v. Carrasco,* 887 F.2d 794, 802 (7th Cir.1989). District courts are given wide latitude to determine whether the government has met its burden, as is generally the case with evidentiary rulings. *Id.*

The district court did not err by admitting Government Exhibits 6 and 7. Agent Foley testified that he listened to Bolden's half of the December 16 and 17 conversations as they occurred and that the recordings accurately portrayed what Bolden said during those conversations. He also testified that he recognized the second voice on the recordings as Eberhart's. Though Agent Foley did not listen to Eberhart's half of the conversations as they occurred, his testimony sufficiently established the tapes' authenticity by clear and convincing evidence. Just as a court may admit a tape recording despite a gap in the chain of custody, *see United States v. Rivera,* 153 F.3d 809, 812 (7th Cir.1998), a court may admit a recording where a witness testifies that he only heard half of the recorded conversation. What the witness did not hear goes to the evidentiary weight of the recording, not to

its admissibility. *Id.; United States v. Brown,* 136 F.3d 1176, 1182 (7th Cir.1998) ("Merely raising the possibility (however hypothetical) of tampering is not sufficient to render evidence inadmissible.").

The same reasoning requires us to conclude that the district court did not err by admitting Government Exhibit 10, which was a tape recording of a number of telephone conversations between Eberhart and a person the government claimed was his supplier. Agent Foley testified that he listened to Eberhart's half of the conversations as they occurred and that the recordings accurately portrayed what Eberhart said during those conversations. This testimony sufficiently supported the district court's admission of this exhibit.

The admission of Exhibit 8, however, is more problematic. The government offered scant evidence that the tape played at trial was the one that recorded Bolden and Eberhart's conversation outside the Kentucky Fried Chicken. Because of an equipment malfunction, the agents only heard "a very short" portion of the conversation as it occurred, and none of the agents testified about the tape's chain of custody. The only evidence concerning the tape's authenticity was Agent Glynn's testimony that he equipped Bolden with a recording device before the conversation with Eberhart, that he removed the recording device after the conversation, and that the voices on the tape were Bolden's and Eberhart's.

Though we question whether this is clear and convincing evidence that Government Exhibit 8 truly and accurately recorded the conversation that occurred between Eberhart and Bolden, the plain error doctrine requires Eberhart to show that the error was obvious and that it

affected his substantial rights. *See United States v. Olano,* 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. McGee,* 60 F.3d 1266, 1272 (7th Cir.1995) ("The error must be clear under current law."). He has not satisfied either requirement. Indeed, he has not cited (and we have not found) any decision in which we have held that a tape recording was not properly authenticated at trial. In addition, our previous rulings indicate that district courts have broad discretion in determining whether tape recordings have been authenticated. *See United States v. Welch,* 945 F.2d 1378, 1383 (7th Cir.1991). Consequently, the error was not obvious.

Nor has Eberhart established that the admission of Government Exhibit 8 affected the outcome of the proceedings. *See Olano,* 507 U.S. at 734, 113 S.Ct. 1770. Even without the contents of this recording, the government had strong evidence that Eberhart conspired to possess cocaine. It offered the phone calls between Bolden and Eberhart, Eberhart's presence at the meeting with Bolden outside Kentucky Fried Chicken, Eberhart's confession, phone calls between Tommy and Eberhart, and tools of drug-dealing found in the garage where Eberhart said that Tommy stored his drugs. Given this evidence, the admission of Government Exhibit 8 was not plain error.

Eberhart also argues that the statements on the tapes were inadmissible hearsay. The Court rejects the argument. Eberhart's statements were admissions, which the district court properly admitted under Federal Rule of Evidence 801(d)(2). Bolden and Tommy's statements were not hearsay because they were admitted, not for the truth of the matter asserted, but to place Eberhart's statements in context. *See United States v. Gajo,* 290 F.3d 922, 929-30 (7th Cir.2002) (collecting cases).

D. Sufficiency of the Evidence

Eberhart's last argument is that the government did not offer sufficient evidence to support Eberhart's conviction for conspiracy or to support the district court's sentencing determination that the conspiracy involved more that five kilograms of cocaine. To prove a conspiracy between Eberhart and Bolden, the government needed to show more than a series of spot sales, because buying and selling drugs, without more, does not constitute a conspiracy. *See United States v. Thomas,* 284 F.3d 746, 752 (7th Cir.2002). Rather, the government had to prove "an understanding – explicit or implicit – among co-conspirators to work together to commit the offense." *United States v. Medina,* 430 F.3d 869, 881 (7th Cir.2005). Factors indicating a drug conspiracy include transactions that involve large quantities of drugs, prolonged cooperation between parties, standardized dealings, and sales on credit. *United States v. Berry,* 133 F.3d 1020, 1023 (7th Cir.1998).

In this case, the government presented ample evidence that Eberhart dealt in large quantities of drugs, bought and sold drugs on credit, and cooperated with Bolden over a significant period of time. First and foremost, Eberhart confessed to dealing forty kilograms of cocaine per month for a period of one year and to receiving drugs from Tommy on credit. Though Eberhart disputes the reliability of his confession, it was corroborated – at least in part – by the money counting machine, gun, and scales found at the stash house where Eberhart said that Tommy stored his drugs. In any event, the reliability of the confession was a determination for the jury to make. Additionally, Eberhart's taped conversations suggested that he provided Bolden with $40,000 worth of drugs on credit, and phone records established that Eberhart had

called Bolden 196 times in the six months prior to his arrest. This evidence amply supported Eberhart's conviction for conspiracy to distribute or possess cocaine. It also supported the district court's conclusion that Eberhart was responsible for distributing five or more kilograms of cocaine.[1]

III. Conclusion

For the reasons stated above, we Affirm the judgment of the district court.

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[1] Eberhart makes three additional arguments which he concedes we previously rejected. Def. Reply at 6. We decline to revisit those issues.

434 F.3d 935

United States Court of Appeals, Seventh Circuit.
UNITED STATES of America,
Plaintiff-Appellant, Cross-Appellee,

v.

Ivan EBERHART,
Defendant-Appellee, Cross-Appellant.
No. 03-2068, 04-1377.

Submitted Dec. 27, 2005.
Decided Jan. 10, 2006.
Rehearing and Rehearing En Banc
Denied Feb. 23, 2006.

Amarjeet Singh Bhachu (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellant, Cross-Appellee.

Leonard C. Goodman (argued), Chicago, IL, for Defendant-Appellee, Cross-Appellant.

Before FLAUM, Chief Judge, and BAUER and POSNER, Circuit Judges.

FLAUM, Chief Judge.

Ivan Eberhart was convicted by a jury of conspiring to distribute cocaine in violation of 21 U.S.C. § 846 and acquitted of distributing cocaine in violation of 21 U.S.C. § 841(a)(1). He subsequently moved for a new trial within the time limits of Federal Rule of Criminal Procedure 33. That motion alleged one error on which Eberhart believed a new trial should be granted. In a supplemental memorandum, filed after the Rule 33 deadline, Eberhart alleged two additional errors that he believed entitled him to a new trial. The government did not object to the timeliness

of these two additional grounds. The district court granted the motion for a new trial based on all three grounds. On appeal, the government argued that the district court lacked jurisdiction to consider the two grounds raised in the supplemental memorandum, since Rule 33's time limits had expired at the time that memorandum was filed. We agreed. *United States v. Eberhart,* 388 F.3d 1043, 1049-50 (7th Cir.2004). The Supreme Court granted certiorari, and held that Rule 33's time requirements are non-jurisdictional claim processing rules, and may be forfeited if not properly contested in the district court. *Eberhart v. United States,* 546 U.S. ___, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (per curiam). The Court remanded the case so that we might consider the government's appeal with the knowledge that the district court had jurisdiction to review all three claims absent a government objection.

We have considered all three grounds for a new trial that Eberhart proffered and find that none, either alone or in combination, provided a sufficient basis for the district court to grant a new trial. Accordingly, we reverse the district court's decision to grant a new trial.

I. Background

What follows are the facts of this case that are relevant to our holding today. A more complete version of the facts may be found in our original panel decision, *United States v. Eberhart,* 388 F.3d 1043 (7th Cir.2004), *rev'd,* ___ U.S. ___, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (hereinafter *Eberhart I*).

On Dec. 16, 1998, Drug Enforcement Administration ("DEA") Task Force Officer Daniel Foley and DEA Agent Robert Glynn arrested Charles Bolden for distributing

cocaine. After being arrested, Bolden agreed to help the DEA apprehend his drug source, whom he identified as "E." Officer Foley and Agent Glynn directed Bolden to telephone his source, order two kilograms of cocaine, and attempt to arrange an in-person meeting. Bolden then called Eberhart. This phone conversation, like many others between the two, was recorded.

After several phone calls between Bolden and Eberhart, the two agreed to meet "where [they] met last time." As Eberhart was leaving this meeting, DEA agents arrested him. Although the agents did not discover drugs in Eberhart's possession, Eberhart confessed that he had been distributing between twenty and forty kilograms of cocaine per month, and that Bolden was one of his customers. Eberhart also described his source of drugs to the agents as a man named "Tommy." "Tommy" was never apprehended.

Eberhart was eventually charged and tried for conspiring to distribute cocaine and distributing cocaine. During the course of the trial, transcripts of phone calls between Bolden and Eberhart were introduced into evidence. The jury, however, was instructed that the transcripts were merely aids in interpreting the contents of the tape. Additionally, the district court, over defense counsel's objection, allowed the DEA agents to testify that Bolden had told them that his supplier's name was "E," and that the agents then instructed Bolden to call "E." The jury was instructed that this information was only being introduced to show the course of the investigation, and not for the truth of the statement.

On April 3, 2003, a jury convicted Eberhart of conspiring to distribute cocaine, but acquitted him of the distribution

charge. On May 15, 2002, Eberhart moved for judgment of acquittal or, in the alternative, a new trial. Eberhart filed a supplemental memorandum in support of this motion on Oct. 30, 2002.

Although the original motion was timely, the October supplement was outside of the time limits set forth in Federal Rule of Criminal Procedure 33 for motions for a new trial. In his original motion, Eberhart stated only one ground for a new trial: that transcripts introduced into evidence were inaccurate. In the supplement, he raised two additional grounds: (1) that agents were improperly allowed to testify that Bolden identified his supplier as "E" and (2) that the "buyer-seller" instruction had not been given to the jury. The government never objected to these two grounds' untimeliness.

The district court denied the motion for acquittal, but granted the motion for a new trial. Although the court acknowledged that no one of the claimed errors, or even any pair of them, would justify a new trial, the court ruled that the cumulative effect of all three justified a new trial.

The government appealed the case to this court. We ruled that the time requirements of Rule 33 were jurisdictional, and that the district court had lacked the power to hear those claims. We further ruled that the government's timeliness objection, because it involved subject matter jurisdiction, was not forfeited by the prosecution's failure to object in the district court. Additionally, we ruled that the one timely claim, regarding the transcripts, did not constitute error. Accordingly, we reversed the district court's decision to grant a new trial. *Eberhart I.*

The Supreme Court granted certiorari, and overturned our holding that the time limits of Rule 33 were

jurisdictional. The Court ruled that the timing requirement was a mere claims processing rule. *Eberhart v. United States,* ___ U.S. ___, ___, 126 S.Ct. 403, 405, 163 L.Ed.2d 14 (2005). In the absence of a timeliness objection, therefore, the district court had properly considered the two additional claims. The case was remanded to this court to substantively evaluate Eberhart's additional claims.

II. Discussion

The district court stated that it was granting Eberhart's request for a new trial for three reasons: (1) DEA agents' testimony that Bolden stated that his supplier was "E" should have been excluded; (2) the transcript of Bolden's taped phone conversations was inaccurate; and (3) no buyer-seller instruction was given to the jury. The district court stated in its opinion that "[t]aken by themselves, none of these concerns standing alone or in pairing would cause me to grant a new trial." All three combined, however, convinced the district court that a new trial was warranted.

In some cases, the cumulative harm of several errors may justify a new trial when a single error standing alone would not. In order for this case to fall into that category, however, each of the three errors must cause some degree of harm to accumulate, as the district court acknowledged.

In *Eberhart I,* we ruled that the potential transcript "error" was not an error at all. Therefore, it could not have caused a harm to Eberhart. We now reiterate what we stated in that opinion:

> Even if the transcript mistakenly quotes Eberhart as calling, *in haec verba,* for a "face to face" meeting, undisputed portions of the transcript make clear that the two men planned to meet in person. Eberhart's exact choice of words was immaterial to the government's closing argument – that defendant's plan to meet in person was consistent with the actions of a drug dealer trying to evade detection by law enforcement.
>
> Moreover, the district court instructed the jurors that: (i) the tape was evidence; (ii) the transcript was not evidence, but merely a guide to the contents of the tape; and (iii) in the event of a conflict between the two, the tape controlled. We presume that jurors follow instructions given them. This presumption is only overcome if there is an overwhelming probability that the jury was unable to follow the instruction as given. Eberhart offers no evidence to rebut this presumption.

Eberhart I, 388 F.3d at 1050 (internal quotation marks, citations, and footnotes omitted).

Similarly, the district court's admission of Bolden's statements was not an error and caused no harm to Eberhart. As the district court itself noted:

> It is true that Bolden told many different stories and admitted lying to the agents, but Eberhart, he said, was always the one who gave him drugs (on varying dates, in varying quantities, and at varying locations). There could have been no impeachment on the central point that Bolden named Eberhart as a supplier. Moreover, the prosecution relied on Bolden neither at trial nor in the investigation. His actions were always monitored by the agents. Furthermore, I do not

> recall any government witness or lawyer who said Bolden was reliable. It is difficult to believe, in light of the split verdict, that the jury thought much of Bolden. Bolden was not an accuser in the context of the case, and it was not in anyone's interest except Eberhart's to make him an accuser.

We agree with the district court's assessment. We further note that the court gave a thorough limiting instruction to the jury after the testimony, informing the jurors that they were not to consider Bolden's statement as truth, but only as an explanation of why the investigation proceeded as it did. This instruction addressed any potential hearsay harm from the testimony, and did not, as defense counsel claims, make the testimony seem like an underlying fact of the investigation. To rule otherwise would negate the course of investigation rule found in *United States v. Akinrinade,* 61 F.3d 1279, 1283 (7th Cir.1995).

Moreover, even assuming that the jury improperly considered the evidence for its truth, the evidence was clearly cumulative, as Eberhart confessed to the agents that he was Bolden's supplier, and the jury heard that confession.

On appeal, Eberhart further argued that this testimony violated his constitutional rights under the Confrontation Clause and the Due Process Clause. We now reaffirm our rejection of those arguments in *Eberhart I:*

> First, defendant asserts that the introduction of Bolden's statement violated his rights under the Confrontation Clause.... The Confrontation Clause "does not bar the use of testimonial statement for purposes other than establishing

> the truth of the matter asserted." *Crawford v. Washington,* [124 S.Ct. 1354, 1369 n. 9 (2004)]. The government, moreover, did not dwell on Bolden's statement. To the contrary, it was defense counsel who connected the dots, asserted that "E" meant Eberhart, and revisited the issue of Bolden's statement on cross-examination.
>
> Second, defendant contends that the government violated his Due Process rights by misrepresenting to the district court that Bolden was not peculiarly within its power to produce. Eberhart argues that the district court, based on this misinformation, denied his request for a missing witness instruction. Eberhart . . . fails to point out any misrepresentation made by the government.

Eberhart I, 388 F.3d at 1050-51.[1]

Finally, omitting the buyer-seller instruction was not error, "A defendant is only entitled to a buyer-seller instruction if it is supported by evidence produced at

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[1] This case does not, as Eberhart argues, fall under the precedent of *United States v. Silva,* 380 F.3d 1018 (7th Cir.2004). In that case, the court ruled that the statements at issue could not have been relevant to any issue *other* than their truth. *Silva,* 380 F.3d at 1020. For example, the court had admitted a police officer's statement that a green substance found in the defendant's car "later tested positive for cannabis," even though the defendant was not charged with an offense related to marijuana, and the officer had no firsthand knowledge of the test results. In this case, however, Bolden's statements about "E" helped the jury to understand why Bolden was asked to call "E." This background gave context to the recorded phone conversation that the jury heard. Moreover, the prosecutor in *Silva* used the statements during closing arguments as substantive evidence of the defendant's guilt, and the district court essentially abrogated its own limiting instruction following the defense's objection. *Id.* at 1021. Nothing of the sort happened here. The two cases are clearly distinguishable.

trial." *United States v. Fort,* 998 F.2d 542, 547 (7th Cir.1993). If an instruction is inconsistent with the defense's theory of the case, it is inappropriate. *Id.*

Eberhart defended the conspiracy charge by arguing that he had a legitimate business relationship with Bolden, that he was elsewhere on the date of the alleged drug transaction, and that he was not involved in drug sales in any way. Eberhart did not argue that he should be acquitted because he and Bolden had a mere buyer-seller relationship. Because the instruction is inconsistent with Eberhart's theory of the case, the district court was correct in omitting it. Moreover, the defense did not request the instruction.

Eberhart argues in his Rule 54 statement following remand that the district court intimated at sentencing that it believed that other errors occurred at his trial. Any such alleged errors were not properly preserved and raised on appeal, and hence we may not consider them.

While recognizing that the district court had jurisdiction to hear the three preserved claims of error, we remain unable to affirm the district court's decision to grant a new trial. In our judgment, none of the claims, whether viewed individually or collectively, warranted the district court's action. Hence, we hold that the grant constituted an abuse of discretion.

III. Conclusion

The district court's grant of a new trial is hereby Reversed.

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	**Case Number: 98-CR-946-1**
	)	**Judge: James B. Zagel**
v.	)	(Filed Apr. 22, 2005)
	)	
IVAN EBERHARDT	)	

Leonard Goodman, Defendant's Attorney
Amarjeet Bhachu, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) 1 of the indictment.

THERE WAS A:

judgment of acquittal as to count(s) 2 of the indictment. The defendant is acquitted and discharged as to this/these counts.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1) and 846	Conspiracy to possess with intent to distribute cocaine	12-16-1998	1

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **135 months**.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE

(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court:

At least two within the first sixty days.

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer, and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall participate in a drug aftercare program approved by the probation officer, which may include residential program for treatment of a narcotic addiction or drug or alcohol dependency and/or testing for detection of substance use or abuse.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). the payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$100.00	Fine Waived	**$**	**$**

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal. Defendant is bond pending appeal.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ .

By: _____
(Signature)

Name (Print) _____

Title (Print) _____

Date of Imposition of Judgment/Sentencing: April 22, 2005

/s/ James B. Zagel
JAMES B. ZAGEL
UNITED STATES
DISTRICT JUDGE

Dated at Chicago, Illinois
this 25th day of April, 2005

STATEMENT OF REASONS
[NOT FOR PUBLIC DISCLOSURE]

Defendant's Last Known Address: 1029 Patricia Lane
Crete, IL 60417

DOB: XX-XX-1969
USM #: XXXXX-424
SSN: XXX-XX-7966

THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES:

Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level or specific offense characteristics): Reduction in base offense level on court determination of lesser distribution amount.

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS

The guideline range is reasonable and while the offender is typical, the offense is milder than the typical offense so the sentence is lower that the middle of the Guideline range.

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: 32

Criminal History Category: II

Imprisonment Range: 135-168 months

Supervised Release Range: 3-5 yeas

Fine Range: $17,500-$4,000,000

Fine waived or below the guideline range because of inability to pay.

THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS:

/s/ James B. Zagel
JAMES B. ZAGEL
UNITED STATES
DISTRICT JUDGE

Dated at Chicago, Illinois
this 25th day of April, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. IVAN EBERHART, Defendant.	No. 98 CR 946 Judge James B. Zagel (Filed Mar. 21, 2003)

MEMORANDUM OPINION AND ORDER

Defendant Ivan Eberhart was convicted of a drug conspiracy but aequitted of a substantive drug offense, which was alleged to be part of the drug conspiracy. He has filed a multi-issue motion for a new trial or acquittal and then an addendum. My views on many of the issues are set forth in the record, and thus I do not address them, but there are three issues worthy of extended consideration: (1) the testimony that Bolden gave the name "E" as his supplier; (2) the possibility that a transcript is not supported by the tape; and (3) the absence of a buyer-seller instruction.

At trial, I permitted the agents to state that Charles Bolden told them that his source of supply was an individual nicknamed "E." The agents then had Bolden set up a meeting with "E" who turned out to be Eberhart. I admitted this evidence, not for its truth, but to explain why the officers did what they did. Were I to rule on this issue again, I might rule differently because there was no hint in the opening statement that Eberhart planned to defend on the ground of improper law enforcement. Instead, the defense was that Bolden gave up Eberhart's name because

Bolden knew Eberhart – a fact difficult to deny given the 196 calls made between the two men in a sixth-month period – from legitimate dealing in the music business and Bolden owed Eberhart money. The agents were entitled to explain why they did what they did, but they did not need to say that Bolden said, in essence, that "E" is my supplier.

The more pressing question, however, is whether Eberhart's position was worsened by this evidence. The answer is probably not, but even if it was, it was worsened by an amount so slight that the error, standing alone, would not justify a new trial. The jury was entitled to know and was told, in large part without objection, that when someone like Bolden is arrested the agents try to go up the chain. The jury would have known that Bolden set up the meeting with Eberhart and heard a good deal of the meeting via tape recording. It is therefore difficult to imagine how a jury could have thought anything but that Bolden named Eberhart. However, they could not have used that as substantive evidence of Eberhart's guilt if they followed my instructions, which I must presume they did.

Knowing this, Eberhart casts his argument in a different way and weaves together three separate arguments. By letting the jury hear that Bolden talked of "E" to the agents, so the argument goes, Bolden became an accuser. As an accuser, he was unreliable because he told many different stories which Eberhart was precluded from introducing to the jury because the government did not call Bolden as a witness. By using Bolden's statement to the agents, therefore, the prosecution got in an identification of Eberhart from a witness who could not be impeached. This error was compounded by the failure to give a missing witness instruction.

This argument misses the mark. It is true that Bolden told many different stories and admitted lying to the agents, but Eberhart, he said, was always the one who gave him drugs (on varying dates, in varying quantities, and at varying locations). There could have been no impeachment on the central point that Bolden named Eberhart as a supplier. Moreover, the prosecution relied on Bolden neither at trial nor in the investigation. His actions were always monitored by the agents. Furthermore, I do not recall any government witness or lawyer who said Bolden was reliable. It is difficult to believe, in light of the split verdict, that the jury thought much of Bolden. Bolden was not an accuser in the context of this case, and it was not in anyone's interest except Eberhart's to make him an accuser.

Bolden started in this case as a cooperating witness, but the government thought he was not completely truthful, and the cooperation agreement fell apart. He subsequently stood trial and was convicted. He was not a witness in the control of the prosecution whose absence can be held against the prosecution. As I mentioned at trial, I would have been willing to writ or subpoena Bolden (or any other witness, for that matter) to court if Eberhart wanted him as a witness. Witnesses like Bolden are the very reason why missing witness instructions are disfavored in this Circuit. They are the kind of witnesses who are a disaster for whoever calls them to the stand, even if examined adversely. Regarding Bolden, whatever he would say on a defense direct would be severely damaged by what he would have to say on prosecution cross, and whatever he would say on a prosecution direct would be severely damaged by what he would have to admit on a defense cross. Nearly all trial counsel would rightly choose

to be the cross-examiner because it is they who usually score the most points in these situations. Bolden was not a missing witness. He was an undesirable witness belonging to no one.

The second issue meriting discussion here concerns the tape recordings in which Eberhart was heard to say things that a reasonable jury could find to be strong evidence that the two men were engaged in a drug conspiracy. The tape recordings were authenticated by agents who heard part of the conversation as it was occurring and testified that the recordings were accurate as to what they heard. This is enough. If the finder of fact believes this testimony, then the finder of fact can infer from the accuracy of a substantial part of the recording, that the recording device was operating properly and that the entire tape is an accurate recording. Of course, this evidence can be contradicted by someone who says the recording is inaccurate, but no one did so here. It is now claimed that one of the transcripts is inaccurate. The jury was instructed that the words that mattered were those on the tape and not those on the transcript. Even though the supposed error is found in just one transcript, and even though Eberhart had the opportunity to have the evidence he has proffered now presented at the trial, the new evidence regarding the transcript is nonetheless troubling. The transcript denoted Eberhart saying "I'm going to talk to you face to face." There is now reason to believe the words may not be appropriately discerned and the jury should have been informed of this. These words matter here because the jury was rightly told that "face to face" meetings are par for the course in criminal enterprises that fear wiretaps. Both prosecutors emphasized this in their respective closings.

The last issue meriting discussion is the argument that I ought to have given a buyer-seller instruction. Buyer-seller instructions are offered with some regularity in drug conspiracy cases. In this case, however, there are factors that militate against the defense. Eberhart and Bolden had a long term association and, if one listens to the tape, a substantial degree of mutual trust. There is evidence from Eberhart that with respect to another member of the conspiracy – one of the unknown others – Tommy, Eberhart was permitted to take drugs on consignment and at certain pre-set times. This is a sign of trust based on both a regularized course of transacting business and regular payment for the goods. Nevertheless, there is a decent argument that the buyer-seller defense should not have been removed from the jury's consideration. The evidence of the conspiracy with Tommy came, with some corroboration, from the confession of Eberhart. The evidence of that relationship is far from complete because the agents never got their hands on Tommy. The relationship of Bolden to Eberhart is, in some respects, arguably one of buyer-seller although the jury acquitted Eberhart of the one sale. It is also true that the buyer-seller argument would, I think, have had little chance of succeeding.

Taken by themselves, none of these concerns standing alone or in pairing would cause me to grant a new trial. However, the combination of all three causes me to grant the motion for new trial. The possibility that a transcript is not supported by the tape, the absence of a buyer-seller instruction and, this is least significant, the testimony that Bolden gave the name "E" as his supplier all together persuade me that the interests of justice require a new trial. I believe a new trial will quite likely lead to another

conviction (and, indeed, Eberhart's acquittal of the substantive transaction may put him in a tactically much worse position at a retrial), but the result in a second trial will be less subject to my doubts than the first one has been.

For the aforementioned reasons along with the material on the record, Eberhart's Motion for New Trial is GRANTED but his Motion for Judgment of Acquittal is DENIED.

ENTER:

/s/ James B. Zagel
James B. Zagel
United States District Judge

DATE: MAR 21 2003

United States Court of Appeals, Seventh Circuit.
UNITED STATES of America,
Plaintiff-Appellant, Cross-Appellee,
v.
Ivan EBERHART, Defendant-Appellee, Cross-Appellant.

Nos. 03-2068, 04-1377.

Argued Oct. 1, 2004.
Decided Oct. 28, 2004.

Rehearing and Rehearing En Banc Denied Dec. 17, 2004.

Amarjeet Singh Bhachu (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Leonard C. Goodman (argued), Chicago, IL, for Defendant-Appellee and Defendant-Appellant.

Before FLAUM, Chief Judge, and BAUER and POSNER, Circuit Judges.

FLAUM, Chief Judge.

Ivan Eberhart was convicted by a jury of conspiring to distribute cocaine. Eberhart subsequently moved for a judgment of acquittal or in the alternative for a new trial. The district court denied the motion for judgment of acquittal, but granted the motion for a new trial. The government appeals the grant of a new trial, and Eberhart cross-appeals the denial of the judgment of acquittal. For the reasons stated herein, we reverse the grant of a new trial, remand for sentencing, and dismiss the cross-appeal for lack of jurisdiction.

I. Background

On December 16, 1998, Drug Enforcement Agency ("DEA") Task Force Officer Daniel Foley and DEA Agent

Robert Glynn arrested Charles Bolden for distributing cocaine. After being arrested, Bolden agreed to help the DEA apprehend his drug source, then identified only as "E." Officer Foley and Agent Glynn directed Bolden to telephone his source, order two kilograms of cocaine, and attempt to arrange a meeting in person. Bolden then called Eberhart:

> BOLDEN: Hey I need you.
>
> EBERHART: Okay. What flavor.
>
> BOLDEN: Uh, I need about 2 more.
>
> EBERHART: Okay [unintelligible].[1]

After several additional phone calls, the two men agreed to meet at 5:15 P.M. on December 17, 1998, "where we met at last time [] by the state trooper place." Before the meeting, Foley and Glynn fitted Bolden with an electronic recording and transmitting device. They then followed in a separate car as Bolden drove to a parking lot outside a Kentucky Fried Chicken at the intersection of East 83rd Street and South Martin Luther King Drive in Chicago.[2] At 5:15 P.M., Eberhart arrived. Bolden got into Eberhart's car and the two drove out of the parking lot. As they drove, Eberhart repeatedly asked Bolden what had happened to him while in DEA custody the day before.[3] After talking for several

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[1] The DEA recorded this and several other conversations between Bolden and Eberhart.

[2] The parking lot was directly across the street from an Illinois State Police building.

[3] Just before being arrested on December 16, 1998, Bolden called Eberhart and alerted him that the DEA was about to arrest him.

minutes, the men returned to the parking lot. When Bolden got out of the car, DEA agents arrested Eberhart.

Although no drugs were found on Eberhart, he confessed that he had been distributing between twenty and forty kilograms of cocaine per month, that Bolden was one of his customers, and that he had sold Bolden two kilograms of cocaine on December 15, 1998. Eberhart also agreed to help the DEA arrest his source of supply, identified only as "Tommy." Defendant gave Foley and Glynn a physical description of Tommy, his cellular and pager phone numbers, and the location of a "stash house" out of which Tommy operated. Eberhart also explained that his standard procedure for obtaining additional cocaine was to call Tommy, schedule a pick up, and arrive at the stash house at either 6:00 A.M. or 6:00 P.M. to blend in with ordinary commuters.

At the direction of Foley and Glynn, Eberhart called Tommy to attempt to arrange a cocaine sale. On December 19, 1998, however, Eberhart terminated his cooperation with the DEA. The sale fell through, and Tommy was never apprehended. Despite these setbacks, Foley and Glynn searched the stash house identified by Eberhart, discovering a scale, a firearm, and two high-speed money counters.

On March 16, 1999, the grand jury for the Northern District of Illinois indicted Eberhart on one count of conspiring to distribute cocaine, and one count of distributing cocaine. At trial, the government introduced evidence of its investigation as described above.

On April 3, 2002, a jury acquitted Eberhart of the distribution charge, but convicted him of the conspiracy charge. The district court set May 15, 2002 as the deadline

for post-trial motions. On May 15, 2002, Eberhart moved for judgment of acquittal or, in the alternative, a new trial. On October 30, 2002, Eberhart filed a supplemental memorandum in support of his motions for judgment of acquittal or a new trial.

On March 21, 2003, the district court denied the motion for judgment of acquittal, but granted the motion for a new trial. It cited three reasons justifying a new trial. First, the court explained that it was concerned about the accuracy of a transcript of one of the phone conversations between Eberhart and Bolden that had been published to the jury. The transcript at issue (Transcript 7A) reflects the following exchange:

> BOLDEN: Okay, so, [unintelligible] we gonna take care of them people? How you wanna do that?
>
> EBERHART: I'm gonna, I'm gonna talk to you face to face.
>
> BOLDEN: Okay. Alright, I'll see you then.[4]

In closing argument, the government repeatedly emphasized Eberhart's desire for a "face to face" meeting, asserting that this was consistent with the actions of a drug dealer attempting to avoid having his conversations recorded by law enforcement.

After trial, however, a defense expert opined that Transcript 7A incorrectly quoted Eberhart as calling for a

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[4] Transcript 7A was published to the jury without objection. Defense counsel later objected to allowing the jury to take all of the transcripts into the deliberation room. The district court overruled the objection.

"face to face" meeting. The expert asserted that, "it is impossible to determine from the tape what is actually being said. The phrase 'face to face' clearly does not fit with the rhythm and articulation of syllables on the tape."

The second reason cited by the district court as justifying a new trial was its belief that it might have erred in allowing potential hearsay testimony into evidence. During the government's case-in-chief, Foley testified about his post-arrest interview with Bolden, despite the fact that Bolden was not called as a witness. The government asked Foley who Bolden had identified as his source of supply. Over defense counsel's objection, the district court permitted Foley to answer, instructing the jurors that they should consider the testimony only to explain the course of the investigation, not for its truth. Foley then testified that Bolden "agreed to make a phone call to 'E,' his source of supply, to obtain two more kilograms of cocaine." Defense counsel again objected, and asked that the court strike the testimony "about his source of supply, with reference to Ivan Eberhart." The district court overruled the objection. In granting the motion for a new trial, the district court reflected that "[w]ere I to rule on this issue again, I might rule differently."

Finally, the district court granted a new trial because it believed that it had erred by failing to give a buyer-seller instruction to the jury.[5] Defense counsel did not

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[5] Seventh Circuit Pattern Jury Instruction 6.12 provides:

> The existence of a simple buyer-seller relationship between a defendant and another person, without more, is not sufficient to establish a conspiracy, even where the buyer intends to resell [name the goods.] The fact that a defendant may have bought [name of goods] from another person or

(Continued on following page)

request the instruction, nor did he argue to the jury that Eberhart was innocent of the conspiracy charge because he and Bolden had a mere buyer-seller relationship.

In granting the motion, the district court explained: "none of these concerns standing alone or in pairing would cause me to grant a new trial," but the three issues cumulatively "persuade me that the interests of justice require a new trial." The court also noted, "I believe a new trial will quite likely lead to another conviction."

Of the three grounds cited by the district court, Eberhart's initial motion pointed only to the alleged flaw in Transcript 7A as justifying a new trial. The admission of Bolden's statement and the lack of a buyer-seller

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sold [name of goods] to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy.

In considering whether a conspiracy or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following factors:

(1) Whether the transaction involved large quantities of [name of goods];

(2) Whether the parties had a standardized way of doing business over time;

(3) Whether the sales were on credit or on consignment;

(4) Whether the parties had a continuing relationship;

(5) Whether the seller had a financial stake in a resale by the buyer;

(6) Whether the parties had an understanding that the [name of goods] would be resold.

No single factor necessarily indicates by itself that a defendant was or was not engaged in a simple buyer-seller relationship.

instruction were first raised in defendant's untimely supplemental memorandum. The government, however, did not argue to the district court that it lacked jurisdiction to consider the assertions raised in the supplemental memorandum.

II. Discussion

A. New Trial

We have jurisdiction to hear an appeal from the grant of a motion for a new trial under 18 U.S.C. § 3731, and review the district court's decision for abuse of discretion. *United States v. Woolfolk,* 197 F.3d 900, 904-05 (7th Cir.1999); *United States v. Boyd,* 55 F.3d 239, 242 (7th Cir.1995).

Federal Rule of Criminal Procedure 33 provides, in relevant part, that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." "[C]ourts have interpreted [Rule 33] to require a new trial 'in the interests of justice' in a variety of situations in which the substantial rights of the defendant have been jeopardized by errors or omissions during trial." *United States v. Kuzniar,* 881 F.2d 466, 470 (7th Cir.1989). "A jury verdict in a criminal case is not to be overturned lightly, and therefore a Rule 33 motion is not to be granted lightly." *United States v. Santos,* 20 F.3d 280, 285 (7th Cir.1994) (quoting *United States v. Morales,* 902 F.2d 604, 605 (7th Cir.1990), *amended on other grounds,* 910 F.2d 467 (7th Cir.1990)). "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period." Fed.R.Crim.P. 33(b)(2).

The government contends that the district court abused its discretion by basing its decision to grant a new trial on arguments that were not timely raised by Eberhart. The government correctly points out that Eberhart's initial motion did not argue that the district court erred by admitting Bolden's statement or failing to give a buyer-seller instruction. Eberhart counters that the government forfeited its challenge to the timeliness of his supplemental memorandum by not raising the issue before the district court. *See United States v. Olano,* 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (a party may forfeit a right by failing to timely assert it); *EEOC v. Ind. Bell Tel. Co.,* 256 F.3d 516, 526 (7th Cir.2001) (claims of forfeiture may themselves be forfeited). The government replies that Rule 33's time limits are jurisdictional, and, therefore, may be raised for the first time on appeal. Accordingly, the question becomes whether Rule 33's time limits are "jurisdictional."

Federal Rule of Criminal Procedure 45(b)(2) provides, in relevant part, that "[t]he court may not extend the time to take any action under [Rule 33] . . . except as stated in [that] rule[ ]." The Supreme Court has held that Rule 45(b)'s prohibition on extensions of time is "mandatory and jurisdictional." *United States v. Robinson,* 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960); *see also United States v. Smith,* 331 U.S. 469, 474 n. 2, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947) (holding that Rule 33's time limitations cabin the district courts' power to grant a new trial). Following these precedents, "[w]e have previously emphasized that [Rule 33's] 7-day period is jurisdictional, and that the court is without jurisdiction to consider even an amendment to a timely new trial motion if it is filed outside the seven day period, absent a timely extension by

the court or new evidence." *United States v. Washington,* 184 F.3d 653, 659 (7th Cir.1999); *see also United States v. Hocking,* 841 F.2d 735, 736 (7th Cir.1988).

Nevertheless, recent Supreme Court precedent casts doubt on whether Rule 33's time limitations are "jurisdictional" in the sense that they may be raised for the first time on appeal. In *Kontrick v. Ryan,* 540 U.S. 443, 124 S.Ct. 906, 910, 157 L.Ed.2d 867 (2004), the Supreme Court held that Federal Rule of Bankruptcy Procedure 4004, which governs the time for filing objections to a debtor's discharge, was not jurisdictional. The Court concluded, therefore, that a debtor could not challenge the timeliness of a creditor's objection after the objection had been decided on the merits. *Id.*

The Court explained that a rule is jurisdictional only if it "delineat[es] the classes of cases (subject-matter jurisdiction) [or] the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* at 915. Mere "claim-processing rules," however, are not jurisdictional. *Id.*

The reasoning of *Kontrick* may suggest that Rule 33's time limits are merely inflexible claim-processing rules that could be forfeited if not timely asserted. *Kontrick* does not, however, expressly overrule *Robinson* or *Smith.* Because we find these earlier precedents controlling, we are bound to follow them until expressly overruled by the Supreme Court. *Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) "[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the

prerogative of overruling its own decisions." (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). Accordingly, the government may challenge the timeliness of Eberhart's supplemental memorandum for the first time on appeal.

Having determined that we may reach the issue, we find that the district court lacked jurisdiction to consider the arguments raised in Eberhart's supplemental memorandum, which was filed well after the post-trial motions deadline. *See United States v. Holt,* 170 F.3d 698, 702-03 (7th Cir.1999).

Eberhart contends, nevertheless, that the arguments raised in his supplemental memorandum were timely. First, defendant asserts that his initial motion preserved the objection to Bolden's statement by arguing that "the court erred by overruling defense objections and admitting improper evidence and argument to the jury on behalf of the government." The supplemental memorandum merely expanded upon a timely raised argument, Eberhart contends. We disagree. This vague reference did not "apprise[] the court of the precise nature of the alleged error," *United States v. Davis,* 15 F.3d 1393, 1406-07 (7th Cir.1994).

Second, defendant asserts that the arguments raised in his supplemental memorandum relate back to his initial motion. We previously have rejected this theory: "[defendant's] argument that we should allow an amendment or supplemental motion to relate back to the original date would defeat the express language of the rule, and would create a back door through which defendants could raise

additional grounds for the new trial long after the 7-day period had expired." *Holt,* 170 F.3d at 703.

Of the justifications for a new trial cited by the district court, therefore, only the alleged error in Transcript 7A was within its jurisdiction to consider. Standing alone, this was insufficient to justify a new trial.[6] Even if the transcript mistakenly quotes Eberhart as calling, *in haec verba,* for a "face to face" meeting, undisputed portions of the transcript make clear that the two men planned to meet in person.[7] Eberhart's exact choice of words was immaterial to the government's closing argument – that defendant's plan to meet in person was consistent with the actions of a drug dealer trying to evade detection by law enforcement.

Moreover, the district court instructed the jurors that: (i) the tape was evidence; (ii) the transcript was not evidence, but merely a guide to the contents of the tape; and (iii) in the event of a conflict between the two, the tape controlled. We presume that jurors follow the instructions given them. *United States v. Linwood,* 142 F.3d 418, 426 (7th Cir.1998). "[T]his presumption is only overcome if there is an 'overwhelming probability' that the jury was unable to follow the instruction as given." *Id.* (quoting *Doe v. Johnson,* 52 F.3d 1448, 1458 (7th Cir.1995)) (alteration in original). Eberhart offers no evidence to rebut this presumption.

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[6] The district court recognized this: "none of these concerns standing alone or in pairing would cause me to grant a new trial."

[7] For example, unchallenged portions of Transcript 7A quote Eberhart as saying, "I'm ready now. If you wanna see me now?" Moments later, Bolden suggests that they meet "where we met at last time [] by the state trooper place," to which Eberhart responds, "Yeah. Okay."

Eberhart argues that two additional grounds rejected by the district court justify its decision to grant a new trial. First, defendant asserts that the introduction of Bolden's statement violated his rights under the Confrontation Clause. This argument was not raised in Eberhart's initial motion, and therefore cannot be considered. Were we to reach the argument on the merits, it would fail. As discussed, Bolden's statement was offered solely to explain the course of the investigation. The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 1369 n. 9, 158 L.Ed.2d 177 (2004). The government, moreover, did not dwell on Bolden's statement. To the contrary, it was defense counsel who connected the dots, asserted that "E" meant Eberhart, and revisited the issue of Bolden's statement on cross-examination.

Second, defendant contends that the government violated his Due Process rights by misrepresenting to the district court that Bolden was not peculiarly within its power to produce. Eberhart argues that the district court, based on this misinformation, denied his request for a missing witness instruction. Eberhart did not raise a Due Process argument in his initial motion for a new trial, and fails to point out any misrepresentation made by the government. This argument cannot, therefore, justify the district court's grant of a new trial.

The district court cited three alleged errors justifying its grant of defendant's motion for a new trial. The first two were beyond its jurisdiction to consider; the third was not error. Accordingly, the district court abused its discretion in granting a new trial.

B. Judgment of Acquittal

Eberhart cross-appeals the district court's denial of his motion for judgment of acquittal. Because the district court also granted defendant's motion for a new trial, Eberhart concedes that the denial of his motion for judgment of acquittal does not "end[] the litigation on the merits." *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 798, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989) (quoting *Van Cauwenberghe v. Biard,* 486 U.S. 517, 521, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988)). Defendant argues, nevertheless, that we have appellate jurisdiction over his cross-appeal under the collateral order doctrine or the doctrine of pendent appellate jurisdiction. We disagree.

An order may be appealed under the collateral order doctrine only if it: (i) conclusively determines a disputed question; (ii) resolves an important issue separate from the merits of the action; and (iii) is effectively unreviewable on appeal from a final judgment. *United States v. Rinaldi,* 351 F.3d 285, 288 (7th Cir.2003). The order at issue does not satisfy the latter two elements. First, a motion for judgment of acquittal requires a court to evaluate whether a reasonable jury could convict the defendant, and therefore is tied intimately to the merits. *See United States v. Ferguson,* 246 F.3d 129, 138 (2d Cir.2001). Second, Eberhart's motion does not seek to vindicate a right that will be lost irreparably if the case is retried. *Cf. Abney v. United States,* 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Thus, the ruling is effectively reviewable on appeal from a final judgment.

Nor is the denial of Eberhart's motion for judgment of acquittal appealable under the doctrine of pendent appellate jurisdiction. "That doctrine allows a court of appeals

'to review an otherwise unappealable interlocutory order if it is inextricably intertwined with an appealable one.'" *Montaño v. City of Chicago,* 375 F.3d 593, 599 (7th Cir.2004) (quoting *Jones v. InfoCure Corp.,* 310 F.3d 529, 536 (7th Cir.2002)).

It is doubtful that pendent appellate jurisdiction is available in criminal cases. In *Abney,* the Supreme Court held that a defendant could immediately appeal, under the collateral order doctrine, the denial of a motion to dismiss raising a Double Jeopardy defense. 431 U.S. at 662, 97 S.Ct. 2034. The Court cautioned that its holding was "based on the special considerations permeating [Double Jeopardy claims]." *Id.* at 663, 97 S.Ct. 2034. "[O]ther claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss .... are appealable if, and only if, they too fall within [the] collateral-order exception to the final-judgment rule." *Id.* Cases interpreting *Abney* appear to categorically foreclose pendent appellate jurisdiction in criminal cases. *See United States v. MacDonald,* 435 U.S. 850, 857 n. 6, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978); *United States v. Bloom,* 149 F.3d 649, 657 (7th Cir.1998); *Ferguson,* 246 F.3d at 138; *United States v. Hsia,* 176 F.3d 517, 526 (D.C.Cir.1999); *Roberson v. Mullins,* 29 F.3d 132, 136 n. 6 (4th Cir.1994); *United States v. Garner,* 632 F.2d 758, 763 n. 2 (9th Cir.1980). *But see United States v. Van Engel,* 15 F.3d 623, 629 (7th Cir.1993) (suggesting that pendent appellate jurisdiction may be available in criminal cases); *United States v. Zafiro,* 945 F.2d 881, 885 (7th Cir.1991) (same).

We need not decide, however, whether a litigant may ever invoke the doctrine in a criminal case, because it does not apply to Eberhart's cross-appeal. For pendent appellate jurisdiction to apply, "it must be practically indispensable

that we address the merits of the unappealable order in order to resolve the properly-taken appeal." *Montaño,* 375 F.3d at 600 (quoting *United States ex rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co.,* 909 F.2d 259, 262 (7th Cir.1990)). "We can review an unappealable order only if it is so entwined with an appealable one that separate consideration would involve sheer duplication of effort by the parties and this court." *qad. inc. v. ALN Assocs., Inc.,* 974 F.2d 834, 836 (7th Cir.1992) (quoting *Patterson v. Portch,* 853 F.2d 1399, 1403 (7th Cir.1988)).

The two orders at issue in this case are not so closely related that they satisfy this test. To the contrary, "[a] plethora of courts have recognized a fundamental distinction in the standards governing these two motions." *Washington,* 184 F.3d at 657. A court considering a motion for judgment of acquittal must view the evidence in the light most favorable to the government, and only grant the motion if no rational jury could find guilt beyond a reasonable doubt. *Id.* By contrast, a court evaluating a motion for a new trial may weigh evidence, evaluate credibility, and grant the motion if "the substantial rights of the defendant have been jeopardized." *Kuzniar,* 881 F.2d at 470. Because the standards governing the two motions are distinct, we may not exercise pendent appellate jurisdiction over defendant's cross-appeal.

III Conclusion

For the reasons stated herein, we find that the district court abused its discretion in granting a new trial. We therefore REVERSE the district court's grant of a new trial and REMAND for sentencing. We DISMISS the cross-appeal for lack of jurisdiction.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 15, 2006

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Joel M. Flaum, *Circuit Judge*

No. 05-2366

United States of America,
Plaintiff-Appellee,

v.

Ivan Eberhart,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 9S-CB 946

James B. Zagel,
Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by plaintiff-appellee in the above case on November 15, 2006, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 5, 2007

Mr. Leonard C. Goodman
53 W. Jackson Blvd.
Suite 1220
Chicago, IL 60604

Re: Ivan Eberhart
v. United States
Application No. 06A842

Dear Mr. Goodman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on March 5, 2007 extended the time to and including May 14, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By: /s/ Melissa Blalock
Melissa Blalock
Case Analyst